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Page 397

BEFORE THE COPYRIGHT ROYALTY JUDGES

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Copyright Royalty Board

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In the Matter of: :
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MECHANICAL AND DIGITAL : Docket No.:
PHONORECORD DELIVERY RATE : 2006-3-CRB DPRA
ADJUSTMENT PROCEEDING :
: Volume 2 - P.M.
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The following pages constitute the proceedings held in the above-captioned matter, held at the Library of Congress, Madison Building, 101 Independence Avenue, Southeast, Washington, D.C., before T. S. Hubbard, Court Reporter, Capital Reporting Company, beginning at approximately 1:20 p.m.

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1 A P P E A R A N C E S

2 Copyright Royalty Tribunal:

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JUDGE WILLIAM ROBERTS

4 JUDGE STANLEY C. WISNIEWSKI

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By Mr. Smith	498

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(No exhibits were received into evidence.)	

1 (Continued Direct Examination of
2 Mr. Faxon by Mr. Bloch.)

3 CHIEF JUDGE SLEDGE: Come to order.

4 MR. BLOCH: Can I continue, your Honor?

5 CHIEF JUDGE SLEDGE: Not yet.

6 Each time we have been in session, I have
7 intended to announce something, and each time I get
8 into a recess, I remember that I failed to announce
9 it.

10 In our proceedings we do not keep custody of
11 admitted exhibits. The parties are responsible for
12 custody of exhibits and then to deliver the
13 admitted exhibits to the Court in some usable
14 fashion, we do not keep any of that custody. So
15 that is your responsibility, similar to
16 depositions.

17 In addition, on review of the order today on
18 the motion for application of the protective order,
19 the order is corrected.

20 The motion is denied to the extent of
21 agreements that are no longer current. That would
22 be the agreements and the data from those

1 agreements in the written statement.

2 The motion is granted as to agreements that
3 are currently in force and the data from those
4 agreements that are in the written statement.

5 The motion is further granted for internal
6 financial data of the company EMI as there was no
7 objection to the motion as applying to those
8 records. The duty on the movant to file tomorrow
9 the amended log of the redaction will be so moved
10 today.

11 MR. BLOCH: Thank you, your Honor.

12 CHIEF JUDGE SLEDGE: Please proceed.

13 BY MR. BLOCH:

14 Q Mr. Faxon, right before lunch, I believe
15 the last thing you were testifying about was the
16 recoupment of advances; is that correct?

17 A That is correct.

18 Q With respect to Exhibit 2C 0203. Can
19 you tell us again how much of the advances tend to
20 be recouped?

21 A As we discussed before lunch, as we look
22 at the U.S. schedule which is the second page of

1 203, what you see is that our books and records
2 reflect a potential loss and expected loss of over
3 half the advances we put out.

4 Q I would like you to look now at what is
5 submitted as Exhibit C 0204, your written
6 statement, which can be found in Trial Exhibit 3.

7 Do you see that?

8 A I do.

9 Q One thing I would like to ask you, can
10 you tell us what the date is covered by this
11 document?

12 A This would reflect the royaltors in the
13 system as of the end of June 2006, which is the
14 end of a royalty period.

15 Q How do you know that?

16 A Because of when it would have been drawn
17 off the system.

18 Q You mean in relation to the time you
19 submitted your written statement?

20 A Precisely.

21 Q What is royaltor data?

22 A A royaltor is someone who is due income

1 with respect to revenues that had been received by
2 EMI in connection with the licensing of songs or
3 compositions we have under our control.

4 Q Who prepared this document?

5 A This was prepared as the source
6 indicates by our finance department with the
7 assistance of our IT department.

8 Q EMI maintains this data for the people
9 it represents?

10 A Yes. It comes out of our royalty
11 system, the system that is used to count the
12 people who are owed money, the royalties off songs
13 and other compositions we represent.

14 Q If you can please keep your voice up a
15 little.

16 A Sorry.

17 Q What does Exhibit 204 show?

18 A It shows that of the 46,000 individual
19 royaltors those that had earned more than \$100 in
20 the royalty period was a fraction of the number.
21 So, the number in this analysis is \$8,900, and
22 those that had earned more than \$1,000 in that

1 period were just over 10 percent of the total
2 royaltor pool, so a fairly steep climb to any
3 meaningful level of income.

4 Q Does EMI Music Publishing undertake any
5 other activities to promote licensing of his
6 songwriters' works?

7 A We do a whole range of tasks some of
8 which I referred to earlier, which are we do a
9 range of promotional tasks to assure that the
10 songs we represent are placed into the
11 marketplace.

12 So we do a range of licensing, and that of
13 those licenses are not only revenue producing but
14 also great broader awareness.

15 When we put the phrase "Songs in Grey's
16 Anatomy," there was a huge upswing in the demand
17 for their music. So it is the licensing process
18 in and of itself that is also a promotional
19 process

20 But we also do other things that are what one
21 would consider in a purely promotional sense.

22 When iTunes wants to come to us and it says that

1 they would like to create a promotion around a
2 particular composition, and they ask us to do so
3 without receiving a mechanical royalty with
4 respect to that, if one was implicated, we will
5 certainly do that, if we believe it will increase
6 greater awareness and therefore, the long term
7 value of the copyrights that we are responsible
8 for.

9 Q Earlier you testified that EMI Music
10 Publishing also administers rights on behalf of
11 songwriters, correct?

12 A Yes.

13 Q What are those rights?

14 A The rights. We represent the copyright,
15 the bundle of rights constituting the copyrights.
16 They are divisible into mechanical rights subject
17 to these hearings performing rights. In some
18 territories it would be termed somewhat
19 differently, but those here, synchronization
20 rights, the right to associate the song with a
21 visual moving image, stage rights, the right to
22 perform in a stage production. Print rights,

1 meaning, the right to reproduce the song in
2 printed form, sheet music being the way.

3 There are also lyric rights, the ability to
4 separate out the reproduction of the lyrics from
5 the composition.

6 In some aspects, there are adaptation rights,
7 the ability to change the composition and to
8 develop derivative works.

9 Q What does EMI Music Publishing do with
10 respect to each of these rights?

11 A Each one of them to the extent we
12 represent them we administer actively. We look
13 for opportunities to secure exposure and also to
14 license and to receive revenues in respect to
15 those.

16 CHIEF JUDGE SLEDGE: You used the phrase "to
17 the extent we represent them." What does that
18 mean?

19 THE WITNESS: In some instances, for example,
20 stage rights, grant rights, as they are sometimes
21 are referred to, sometimes those are retained by
22 the author, the songwriter for their own accounts,

1 to make the decision solely in their own account
2 and to receive the income.

3 It depends on how the rights have come to us,
4 what the deal is with the songwriter.

5 CHIEF JUDGE SLEDGE: It's not standard with
6 all 46,000?

7 THE WITNESS: No. Certainly what one would
8 say with rare exceptions is that the mechanical
9 right and performing right and sync right, and the
10 print right, when you start to get into some of
11 the more esoteric rights -- Well, esoteric is
12 probably not the right word for stage rights or
13 grant rights, but then those are more likely to
14 have modifications to the norm.

15 BY MR. BLOCH:

16 Q What administrative functions does EMI
17 perform in connection with these rights?

18 A When we represent a song, song comes in,
19 we identify it, we assure the ownership
20 characteristics of it. We then seek to make it
21 available to, in various ways.

22 One is we register the copyright on behalf of

1 the songwriter with the Copyright Office. We
2 register it with collecting societies around the
3 world. We assist it to be assigned in either
4 ASCAP or EMI depending on the membership of the
5 songwriter.

6 And we then establish essentially a record of
7 its ownership and the rights and restrictions
8 related to that. There is a data file.

9 Remember that we're talking about is
10 intellectual property here. It is an intangible
11 and the way we create tangibility is by describing
12 the rights and holding in one place the actual
13 details of the composition. That is the first
14 state of administration.

15 The second stage of administration is the
16 licensing process. We actively do that either
17 through promoting a song to a performing, to a
18 performer, who then wants to record it. We then
19 issue a license with respect to that, and we
20 administer the contractual relationship with the
21 record company who is the owner in that case
22 and/or any of the other potential licensees across

1 various licensing.

2 So we manage those contractual relationships.

3 That means that we monitor the revenue, as the
4 reports we talked earlier are intended to do, and
5 we monitor that they have, that those contracts
6 have been properly -- Not only that the revenue
7 comes in, but the rights have been respected under
8 the terms of those licenses.

9 We interact with the performing rights
10 society and when the mechanical rights are
11 licensed through the Harry Fox Agency we interact
12 with them as well.

13 Once the money comes in, once we have
14 reported it has come in, we then take the reports
15 associated with the funds, divide the money up and
16 put it into the accounts. I will use that as a
17 bit of a euphemism as an accounting.

18 We attribute the revenues to the respective
19 composition and the deal that is associated with
20 it, the deal meaning the relationship with the
21 songwriter or the other royaltors.

22 That then produces at the end of the

1 accounting, the appropriate accounting period a
2 report of what the revenues are and what the share
3 of those revenues belong for each song and for
4 each type of use and t report is delivered to the
5 royaltor along with a check.

6 Now, we do it both electronically and also
7 physically depending on the nature of the
8 requirements of the royaltor.

9 Q EMI Music Publishing didn't perform
10 these services for the songwriters --

11 A Well, obviously, they would have to do
12 it themselves. It can be a very complicated and
13 difficult task. That's why they hire us to do it,
14 in effect.

15 Q Does EMI Music Publishing license songs
16 for distribution through digital services?

17 A Yes, we do.

18 Q What are digital services?

19 A Digital services is an overall term that
20 applies to services that deliver music or rights
21 over the Internet, so-called online services, or
22 through a mobile, through the mobile system.

1 So mobile and on-line is what we consider to
2 be digital. I think that is a generally accepted
3 and understood definition.

4 Q When did EMI Music Publishing begin to
5 license songs for distribution for digital
6 services?

7 A We have always had some, for many years,
8 we have had some implication of rights in the
9 licenses we have touched on. But the first
10 discreet agreement was an agreement with Thomas
11 Dolby in year 2000 for Ring Tones.

12 Q What was involved in that?

13 A Well, we licensed Mr. Dolby's company
14 with the right to adapt our music or the music we
15 represented into Ring Tones, and to distribute
16 those through mobile platforms.

17 Q How important is licensing songs for
18 distribution through digital services to EMI Music
19 Publishing today?

20 A It's a minor part of our revenue base at
21 the moment. It would be larger as the exhibits
22 that were in question earlier this morning suggest

1 if the royalties were paid promptly and
2 accurately.

3 Q Why is that?

4 A From our analysis and from the work that
5 I have done, the answer is that we are not getting
6 paid for those downloads that have been sold to
7 the extent that they have been sold.

8 Q Is the role that EMI Music Publishing
9 plays on behalf of songwriters in the digital
10 world different than it is for physical products?

11 A No. It isn't any different. It does
12 have a different characteristic because obviously
13 we are breaking new ground. We are entering into
14 new types of licenses with new requirements, given
15 the technological changes that are implicit in an
16 online world.

17 The actual function of what we are doing,
18 which is to try to effectively license the works,
19 is the same, but as I say, the actual terms of
20 those licenses, obviously, have to adapt to the
21 mode of distribution and the structure of the
22 business models.

1 Q Has EMI Music Publishing or NMPA on
2 behalf of EMI Music Publishing entered into
3 different types of digital licensing arrangements?

4 A Well, we certainly have entered into a
5 range of different types licenses.

6 We have also participated in licenses that
7 have been done on behalf of the industry through
8 the Harry Fox Agency and under the auspices of the
9 NMPA.

10 Q What agreement are you referring to?

11 A Well, in the latter respect?

12 Q Yes.

13 A Early on there was a question of
14 so-called subscription services on demand streams
15 and the like, that all parties at that time
16 believed was the subject of 115 and would require
17 a rate. We could not come to arrangement as to
18 what that rate is.

19 So EMI along with many other music publishers
20 felt that it was important to allow that new
21 business subscription, on demand streams and the
22 like to begin.

1 So we took the view that we would give a
2 so-called rateless deal, in effect, the right to
3 use the music without paying other than a modest
4 initial advance until a rate was determined.

5 That was five, maybe even six years ago that
6 that decision was taken; and I think the wise
7 decision in the sense that one of the key
8 ingredients to the development of piracy in the
9 world has been the lack of proper licensing. So
10 to restrict licensing when you can put legitimate
11 works into the marketplace is not a good thing.
12 So we took that stand.

13 Q The rates that are referred to in that
14 agreement by Harry Fox on your behalf, are those
15 the rates to be set in this proceeding?

16 A Yes.

17 Q Were the rights of EMI Music
18 Publishing's catalogue covered by this agreement?

19 A Yes.

20 Q Are you familiar with the copyright
21 owners' proposal to raise mechanical right for
22 physical product and the rates it proposes to set

1 for permanent downloads, limited downloads,
2 interactive and streaming and Ring Tones?

3 A Yes.

4 Q Does EMI Music Publishing endorse that
5 proposal?

6 A Yes.

7 Q If the mechanical rate is increased,
8 what impact, if any, would it have on EMI's
9 business?

10 A Clearly our investment in the
11 development of new music and the development of
12 songwriters is dependent upon future cash flows.

13 We are looking forward to the potential
14 income that will be derived. If we can raise that
15 potential income or essentially bring it back to
16 where it has been, then what happens is we are, we
17 are able to make the ongoing investments, the
18 \$200 million here that we talked about in the
19 United States, at that time, and to increase that
20 and to increase the potential for greater creative
21 output through EMI.

22 Frankly, I am very interested in industry

1 doing well, because that means I will do well, but
2 I am most interested in EMI doing well.

3 The more money that I can put at work
4 building the careers and the talent of
5 songwriters, the more likely it is my business
6 will do well.

7 Q I would like you to look at what was
8 submitted as Exhibit CO 210 to Trial Exhibit 3.

9 Do you see that?

10 A Yes.

11 Q Who prepared this document?

12 A Again, much like the earlier one, this
13 is a document that was prepared by my finance team
14 along with the assistance of our IT team.

15 Q What is that?

16 A This is an accounting of the numbers of
17 compositions that EMI represents worldwide, the
18 1.3 million composition number we talked about
19 earlier. Then to identify which of those actually
20 produced any revenue, that's the 260,000 number,
21 and those that generated more than the generated
22 90 percent of the revenue.

1 Basically what this basically says is that
2 28,000 of our 1.3 million compositions account for
3 over 90 percent of our revenue. So that is 2.2
4 percent of the numbers of compositions,
5 representing 90 percent of the revenue. So a
6 very, very steep climb to get to any meaningful
7 revenue.

8 Q Do you know whether the financial
9 incentives for songwriters increased or decreased
10 since the current mechanical rate was agreed upon
11 in 1997.

12 JUDGE WISNIEWSKI: Before you answer that
13 question, Mr. Faxon, looking at this exhibit, do
14 we have a time frame for this?

15 THE WITNESS: This was also extracted at the
16 same time as the earlier document. It was done
17 simultaneously with it. So it would have been as
18 of June 30, 2006, would have been the point at
19 which the finance department and the IT department
20 would have gone through our systems to establish
21 these numbers.

22 JUDGE WISNIEWSKI: What time period would

1 those numbers cover?

2 THE WITNESS: They would have covered the
3 time period for that royalty period, so it would
4 have been compositions we represented in the six
5 or 12-month period preceding June 30, 2006.

6 JUDGE WISNIEWSKI: Thank you.

7 Sorry, Mr. Bloch.

8 BY MR. BLOCH:

9 Q Let me repeat the question.

10 JUDGE ROBERTS: I have a follow up question
11 about that.

12 THE WITNESS: Yes.

13 JUDGE ROBERTS: Given that it is that 2006
14 time frame, this 28,000 number here out of the 1.3
15 million accounting for 90 percent of the
16 royalties, are there other points in time, say
17 like 2005, where a lot of the songs that are in
18 that 28,000 were not in that category, maybe they
19 were in the 1.3 million figure?

20 So in other words, I am asking you how much
21 churn is on that?

22 THE WITNESS: I take it. Well, the churn is

1 not -- It has taken it somewhere. I have the
2 ability to specifically answer that question if I
3 had my data with me, but I will try my best to
4 give you my best recollection of the data.

5 What the data suggests is that the churn year
6 on year is about 10 percent of that number. So 10
7 percent fall out and 10 percent rise, but it
8 generally falls around in that number range.
9 Obviously, it is going to move a bit, but basically
10 about 10 percent gets renewed in a given year.

11 There is a little bit of it that's also
12 important as you think about this. The way that we
13 get paid in music publishing tends to spread things
14 out. A hit today may not pay us for one or two or
15 three periods.

16 A period in my nomenclature is a six-month
17 period because of the way of the payment cycle,
18 because of the way in which -- Let's say, it's
19 mechanical, so it's recorded music. So recorded
20 music sells in the first three -- The first quarter
21 500,000 units. It actually sells through to the
22 public. That is not the point at which we are

1 paid, but that is the point at which we obviously
2 should be paid.

3 There will be a reserve on that number. We
4 will not get paid with respect to 500,000 units.
5 We will get paid with some lesser number. Then
6 that reserve will be cleared over a period of time,
7 so you will not see -- Let's say that's the only
8 amount. You will probably not get fully paid until
9 you were out at least 18 months and the -- and
10 maybe longer, but that is probably is it.

11 So when you look at the income of what starts
12 to happen is it starts to spread -- It's not like a
13 big wave. It moves much more slowly. So the churn
14 is less aggressive, year on year.

15 So in one year if you go back, and you say,
16 "What were the biggest sellers in this year?" If
17 you do this, just on mechanical record sales you
18 might have more coming into this, but because you
19 are spreading the revenue back out it will not look
20 that way in the churn.

21 JUDGE ROBERTS: Given that such a small
22 percentage of the total number of songs earn most

1 of the money why are you carrying so many songs,
2 why are you carrying 1.3 million? Why not carry
3 250,000 songs?

4 THE WITNESS: Well, in part it is because of
5 the nature of the creative output. Songwriters
6 write a lot of songs. Relatively few of them are
7 individually successful. So what you need to do
8 is to allow them to do that. So we control those.

9 We control all of the songs that we tend to
10 have an exclusive relationship for a period of time
11 with the songwriter, so we control all of the songs
12 that they produce in that period of time. So you
13 may have one -- Well, I don't know what your
14 testimony was yesterday, but I will suspect you
15 will have some other songwriters who will come.

16 It is an interesting thing. When I talk to
17 them about how many songs they have written, oh, I
18 have written all of these songs.

19 When I used the term "professional" before,
20 it's they have to concentrate, for many of them,
21 for enough output so that they are able to develop
22 the one or two or five songs that will actually

1 have long-term success.

2 It is an R&D effort on their part, if you
3 will. They are trying to find the elements that
4 come together that make a great song, and it is not
5 a science. So, that is why we have so many songs.

6 By the way, sometimes out of that base that
7 nobody has ever -- That never has earned a penny,
8 somebody discovers it, some performer discovers a
9 song they love and you have "kismet." You have a
10 song that meets the creative requirements of an
11 individual performer and it becomes a hit.

12 So we don't like to get rid of any of those
13 songs. We really like to keep them around.

14 BY MR. BLOCH:

15 Q I will repeat the question. Do you know
16 whether the financial incentives for songwriters
17 increased or decreased since the mechanical rate
18 was agreed upon in 1997?

19 A I think certainly anyone would say or
20 understand that they have not gone up in an
21 inflationary sense, in real terms, in terms of per
22 unit compensation, that's simply deflating, taking

1 the CPI and taking it back. It really hasn't
2 really moved very much.

3 But there's no doubt that the volume of units
4 sold has gone down. Therefore, the aggregate
5 amount of capital or revenues available to
6 songwriters is, has decreased, so in the absolute
7 numbers.

8 Q As an executive at EMI Music Publishing,
9 what information or data do you look at to assess
10 changes in album sales?

11 A There are two real sources in the United
12 States. One is Sound Scan which we subscribe to
13 and all music companies tend to subscribe to.
14 It's a service that has is a very high level of
15 sampling. I think they purport to sample up to 90
16 percent of the marketplace. So that is one
17 report.

18 The other is a report, is reports that are
19 put out by the RIAA. Those are two somewhat
20 different measurements, because the RIAA puts out
21 shipments which has been sold at wholesale by
22 their members. Sound Scan is intended to measure

1 that which is sold at retail to concernment and
2 those numbers are sometimes at variance with one
3 another.

4 Q I would like you to look at what has
5 been submitted as Copyright Owners Exhibit 211, a
6 witness statement.

7 A Right. Yes. This data we look at each
8 time RIAA releases it and this relates to the
9 period ending in 2005.

10 Q It covers the period 1995 to 2005.

11 A Yes.

12 Q As you look at the period of 2000 to
13 2005, what does this data show regarding changes
14 in album sales?

15 A Well, album sales clearly have declined.
16 I think if you sort of put the moment to it, if
17 you look in 2004, the very top lines, CD units
18 shipped, it is gone down from 767,000 in 2004 to
19 705,000 in -- No, million. I'm sorry. This is in
20 millions. In 2005. That is a reduction of about
21 62 million albums.

22 If you sort of put a point to it, if you

1 assume that albums contained 10 to 14 individual
2 songs, then you are looking at somewhere between
3 600 million to close to a billion song
4 opportunities for songwriters to have their songs
5 put into the marketplace. That is not an
6 insignificant impact on the songwriter community.

7 Q Based on your experience at EMI and in
8 the music business, do you know whether piracy has
9 had impact on songwriter incentives to create new
10 songs?

11 A I was fortunate enough to hear the
12 opening statements. I think each of the opening
13 statements was clear, that piracy has had an
14 impact on all parts of the music industry and
15 participants.

16 Q Based on your experience, how do you
17 know?

18 A Well, if you sat in my office for a few
19 days you definitely would hear the songwriters
20 comment on the impact on them as they review their
21 statements and we go through why things are where
22 they are. So I know from personal experience as

1 you will.

2 Q Do you know what control composition
3 clauses are?

4 A Yes.

5 Q What are they?

6 A Control composition clauses are clauses
7 that are agreed to within a recording contract, a
8 contract between a performing artist and their
9 record company.

10 What it provides is that a performer, if they
11 are a writer, a songwriter will limit their
12 royalties to less than the statutory rate and they
13 will do that in two ways.

14 They will do that by a percentage reduction,
15 usually almost invariably what's known as a three
16 quarter rate, so 75 percent of the rate, and then
17 the total amount will be capped at a level,
18 usually by multiplying by a number of songs; say
19 11 songs.

20 So if you were to have 14, which is quite a
21 common number, and by the way, if you have 14
22 songs on an album that's three songs coming off,

1 so you are getting another 25 percent haircut.

2 I know people will say, and it's an argument
3 that has been made directly to me, "Well, that's
4 between the performer and the record company." I
5 will say, "Yes, I am sure that's true. There are
6 gives and takes in that world where compensation
7 for the reduction in the mechanical break is
8 compensated in other ways, fine enough.

9 But there's something more pernicious about
10 these agreements in that they force all other
11 participants in writing on that album into the
12 same box. They do that by penalizing the writer,
13 the writer/performer with having to bare 100
14 percent of the reduction related to those other
15 writers in their share.

16 So what happens is that that reduces the
17 amount of opportunity for other songwriters to
18 participate and changes the dynamic quite a lot.

19 It's one thing to have somebody to give up
20 something that is theirs, it is another to ask
21 them to be your enforcer to get other people to do
22 that.

1 Q In the last ten years have you observed
2 an increase or a decrease in this impact of
3 control composition clauses on songwriters as they
4 apply to physical compositions?

5 A I think I would say ten years is
6 probably not my best period because I reentered
7 music publishing in 1999, and I rather speak from
8 that date to this date, because that is something
9 that I know from personal experience.

10 Personally I would say that indeed there's a
11 higher incidence of controlled compositions
12 clauses being inserted and affecting songwriters
13 both directly as performing performers who also
14 are songwriters and other songwriters who would be
15 otherwise able to write on those records.

16 Q Based on your experience at EMI, do you
17 know if consumers have shifted their purchases
18 from CD albums to singles, digital singles?

19 A What you see here actually on the RIAA,
20 I think, report demonstrates that there has been a
21 mixed shift for the format of choice and the
22 primary format for sale before the Internet age

1 was the album, a bundled product.

2 Today, when you go to the online into the
3 online world you see virtually half of the DPDs,
4 if you will, are associated with singles or are
5 unbundled and half are. So that is a marked
6 change. It changes the dynamics and the
7 economics, certainly for us, and also for our
8 songwriters.

9 Q I was going to ask you: How does the
10 shift affect songwriters?

11 A Well, a songwriter who puts one song on
12 an album gets 1/14th of the royalty. But usually
13 what a writer does is they write several songs on
14 an album, one that may be the big hit, and one
15 which may not be considered as popular. So, they
16 will look at that as averaging it out, because,
17 obviously, is more valuable. It is making more
18 things happen in the marketplace. So they have
19 averaged it out.

20 Now when they are out there in the
21 marketplace where each song stands completely on
22 its own, they do not have the, if you will, the

1 ability to have the transfer of the value across
2 by putting another song on the album. So, they
3 are exposed.

4 I don't know about you, but I don't know how
5 many people have said to me that all I want is the
6 hit song, so that's why I bought the album. Those
7 other songs which are essentially paroled in get
8 no value and you cannot add that up.

9 If I have two songs on it I would have gotten
10 18.2 cents, if I were not subject to a -- Now I
11 only get 9.1 cents. That's a significant change
12 in the microcosm of that individual songwriter.

13 By the way, in my view we should be looking
14 at the microcosm of the individual songwriter
15 because they ultimately are the ones who are being
16 burdened by the statutory requirement and whose
17 income is completely dependent upon what this
18 board says.

19 Q In your various positions in EMI you
20 have become familiar with the terms and conditions
21 under which EMI licenses its music?

22 A Yes.

1 Q What role have you played in connection
2 with EMI Music Publishing's negotiations of
3 licenses on behalf of the songwriters in the
4 various positions that you have held?

5 A When I joined the EMI Music Publishing
6 in 1999, as CFO, as I said earlier, I was
7 responsible for the licensing department and I was
8 intimately involved in the review of the licenses.
9 I completely understood them.

10 I was responsible and continue to this day to
11 be responsible for approving licenses with respect
12 to, first of all, new areas of endeavor, so new
13 formats, new ways of doing business, expansion of
14 rights and grants, and I approved deal terms both
15 in the offer stage and in the final.

16 Obviously, once you get to a template you
17 delegate the activity to the department, but we
18 take care with our contracts to be sure that at
19 the highest level of authority in our business we
20 reviewed them in detail and are sure that we are
21 comfortable with their terms; and if they are
22 altered, we need to know about that.

1 Because, after all, we are in the
2 intellectual property business and when we make an
3 error in the structure of your agreement it could
4 be pretty fatal for the protection of those
5 rights.

6 Q Has EMI Music Publishing entered into
7 the Ring Tone licenses?

8 A Yes.

9 Q Do you know approximately how many Ring
10 Tone agreements EMI Music Publishing has entered
11 into in the United States?

12 A We have included close to 60 such
13 agreements plus the NDMAs which also relate to
14 this and the site which relates to it. So as we
15 included in the offers, in the low 60s is the
16 number.

17 Q Are you familiar with the terms of these
18 agreements?

19 A I am.

20 Q How did you become familiar with them?

21 A Again, as I described a moment ago, the
22 basic template is something that we, that I was

1 intimately involved in back in 2000 and the
2 designing and the basic parameters for deals.

3 Q In preparation of your written
4 statement, did you review EMI's Ring Tone
5 agreements?

6 A Yes, I did.

7 Q Are you familiar with the terms of those
8 agreements?

9 A I am.

10 Q Are the 59 Ring Tone agreements attached
11 to your written statement?

12 A Yes. They are attached.

13 Q I would like you to look at what is
14 marked as Exhibit CO 218 to your written
15 statement, which is in Trial Exhibit 3.

16 MR. BLOCH: Your Honor, if I may approach
17 counsel for a moment?

18 CHIEF JUDGE SLEDGE: Yes.

19 BY MR. BLOCH:

20 Q Can you identify that document, please?

21 A You are going to ask me, I think, about
22 the tab, about one in particular.

1 Q No, I was going to ask you about the
2 overall exhibit, the summary as well.

3 A I am sorry. In this book I don't think
4 they have a summary. 218?

5 Q Yes.

6 A I don't have a summary.

7 JUDGE WISNIEWSKI: It is in the book.

8 THE WITNESS: This one? Oh, that one. Thank
9 you. I was looking in the wrong place. Thank
10 you. Yes. I see that now.

11 BY MR. BLOCH:

12 Q Can you describe that for us, please?

13 A This is a summary of certain of the
14 terms I included in each of the agreements that
15 are included in my statement.

16 Q What is the time frame covered by this
17 summary?

18 A It goes from 2001 through 2006.

19 Q Who prepared this summary?

20 A This was prepared by EMI, our legal
21 staff and copyright staff, and then sort of
22 reformatted, I think, by your staff.

1 Q Did you review this summary?

2 A I did.

3 Q Does the chart accurately summarize the
4 Ring Tone agreements that EMI Music Publishing
5 entered into from September of 2001 through June
6 of 2006?

7 A Yes, it does.

8 Q Turning to the summary. Can you explain
9 what information from the Ring Tone agreements is
10 provided on this?

11 A Obviously on the left-hand side is the
12 licensee, is the counter party, the product, the
13 Ring Tones, in the first case, the effective date,
14 the term, the territory.

15 Typically these are U.S. and Canada. An
16 advance, which is advance against royalties that
17 would be due us under the agreement. A fixing
18 fee. That is a charge for supplying certain data
19 information and maybe even files with respect to
20 the digital files that is, and then the fee to,
21 related thereto, and then the basic royalty terms
22 which are usually formed against a percentage of

1 retail price with a minimum.

2 Q If you will look at the column marked
3 royalty, the far right, there are 59 agreements
4 that are listed. What is the range of royalty
5 rates covered by these agreements?

6 A Typically they are in the range of 10
7 percent. There certainly aren't any less than 10
8 percent of retail value, and the 12 percent,
9 although some do go even as high as 20 percent.
10 The minima tends to stay in the range of 10 to 15
11 cents for Ring Tones and 15, 20 cents for Master
12 Tones.

13 As you will see, the Warner one, we talked
14 about before, has a 20 cent minima?

15 Q What is the purpose of a minima?

16 A Well, the minima is to assure that our
17 songwriters get paid for the true economic value
18 of what it is that they are contributing. That
19 goes back to that earlier comment we talked about,
20 about the intrinsic value of these songs.

21 So the expectation of retail value, of retail
22 prices of Ring Tones and Master Tones was in the

1 \$2.50 to 3.50. So you are looking at something
2 that was a price at that time and continues to be
3 where you will get 25 cents, let's say.

4 But it is entirely possible that somebody
5 might take the view to do a loss leader,
6 effectively to discount the value of the music in
7 order to induce other behavior.

8 We are trying to protect against that. That
9 is a transfer of value that is from our
10 songwriters to them or to somebody else. So that
11 is why we say there is at least a base level of
12 receipt that we must have on behalf of our
13 songwriters.

14 Q So, if some aggregator wanted to promote
15 the sale some other device or whatever, it
16 wouldn't come into the expense of the song?

17 A Right. So if it is a Ring Tone, it says
18 you buy this, you get this handset, and you get
19 100 free Ring Tones, that is fine.

20 MR. CONNOLLY: We object. The purpose of it
21 was definitely not in the direct. In terms of
22 that, beyond the scope of his direct.

1 I'm also concerned because we are now getting
2 into a matter where a question is asked and there
3 is essentially a speech going on that is not
4 directly connected to the question asked.

5 Those are my two objections.

6 CHIEF JUDGE SLEDGE: Mr. Bloch?

7 MR. BLOCH: Your Honor, one moment. There is
8 a chart in Mr. Faxon's testimony, from his
9 statement which summarizes his agreements on page
10 37, paragraph 71. It absolutely identifies the
11 minimums from these agreements.

12 CHIEF JUDGE SLEDGE: Mr. Connolly, how is it
13 beyond the scope?

14 MR. CONNOLLY: Your Honor, I would agree when
15 I objected, I noted that, in fact, a note in here
16 is to testify that there is, in fact, minima in
17 Ring Tones.

18 But we have gone from whether there is minima
19 or not to the purpose of the minima and why it is
20 in these contracts and how it protects and so
21 forth. I think that is beyond what was, in fact,
22 testified to in direct examination.

1 CHIEF JUDGE SLEDGE: Overruled.

2 BY MR. BLOCH:

3 Q Mr. Faxon, the column advances, you
4 mentioned that before, what is the purpose of the
5 advance?

6 A The advance is for several reasons. One
7 is, in fact, to assure the bona fide of the
8 licensee that they actually have the financial
9 capacity of meeting the royalty obligations.

10 Secondly, to be sure, and particularly when
11 you come into new agreements, the setting up of
12 the royalty systems and the payment systems tend
13 to be delayed. So to assure that we have money on
14 hand to pay our writers based on the use, even
15 before those systems actually pay out.

16 Q Let's look at a couple of these Ring
17 Tone agreements. I will ask you to look at the
18 Log Deer Act of North America agreement, listed in
19 the chart at the bottom of page 9, it is dated
20 September 6, 2005.

21 A Right. Yes. It is in the second book,
22 I think, hopefully tabbed.

1 Q What kind of company is Logdire?

2 A Logdire is an aggregator. It is a
3 subsidiary of a French media company, it is in
4 media and construction. Strange combination.

5 Q I see the agreement as entered into
6 between Logdire and EMI Entertainment World, Inc.
7 What is EMI Entertainment World, Inc.?

8 A EMI Entertainment World Inc., is an
9 entity that we use to license, through which we
10 license the rights that we represent.

11 Q What was the royalty that Logdire agreed
12 to pay under this agreement?

13 A They agreed to pay 10 percent of the
14 retail price, and to have a minimum of 10 cents.
15 So Logdire has a 10 percent royalty based on
16 selling price, with a minimum of 12 cents for Ring
17 Tones and 10 percent retail royalty with a minimum
18 of 15 cents for Master Tones.

19 Q If you will, would you look at the
20 Wireless Developer Agency agreement that is listed
21 at the bottom of page 10.

22 MR. SMITH: Your Honor, Mr. Faxon, has tabs

1 on his showing where these documents are. If
2 there is a way they can tell us where the
3 agreement is in these three-inch exhibit book, so
4 we can review that with the witness.

5 THE WITNESS: It may be in the other book.

6 MR. SMITH: Thank you.

7 BY MR. BLOCH:

8 Q Did you find the Wireless Developer
9 Agency agreement?

10 A Yes, I did.

11 Q When did EMI Music Publishing and
12 Wireless Developer Agency enter into this
13 agreement?

14 A We entered into the agreement effective
15 December 1st, 2005.

16 Q What is the royalty that Wireless agreed
17 to pay under this agreement?

18 A It is in paragraph 6C, and it's 12
19 percent of the sales -- 12 percent of the sale
20 price for Ring Tones and Master Tones, and the
21 same, and the same minima of 14 cents.

22 Q At the time that these two Ring Tone

1 agreements were entered into, what was the
2 statutory mechanical rate?

3 A That would have been 8.5 cents.

4 Q At the time that EMI Music Publishing
5 entered into these Ring Tone agreements did EMI
6 Music Publishing believe Ring Tones were the
7 subject of Section 115?

8 A No.

9 Q Are you familiar with term "free goods"?

10 A Yes.

11 Q What is that?

12 A Free goods is a term that's present
13 largely in the physical world is where wholesalers
14 of records provide a discount by delivering more
15 recordings than are paid for. In other words, you
16 give additional discs without compensation. That,
17 in effect, reduces the price.

18 JUDGE ROBERTS: Mr. Bloch, before we leave
19 your previous question, Mr. Faxon, you said EMI
20 did not believe mechanical license applied to Ring
21 Tones?

22 THE WITNESS: Yes.

1 JUDGE ROBERTS: What was the view of Wireless
2 Developer Agency?

3 THE WITNESS: Well, they thought it was wise
4 to assert that, that it was covered. Because
5 that -- that is my speculation, but they asserted
6 that it was covered by 115.

7 JUDGE ROBERTS: Thank you.

8 BY MR. BLOCH:

9 Q You were talking about free goods and
10 describing what they were. What impact does that
11 have on the mechanical royalty?

12 A Free goods typically are not compensated
13 for, I would suggest, in the physical world.
14 Therefore, it goes to reduce the amounts that our
15 songwriters get paid.

16 Q Is the treatment of free goods addressed
17 in the Ring Tones agreements?

18 A Yes.

19 Q If you will look at the Logdire
20 agreement, paragraph 7E, can you tell us what that
21 concerns?

22 A Yes. It provides that there shall be no

1 free or bonus goods as those are commonly known.

2 Q Why did EMI provide that royalty rates
3 are not subject to deductions for free or bonus
4 goods?

5 A We believe that there was value being
6 transferred, transmitted from each and every Ring
7 Tone or Master Tone and that our songwriters
8 should be compensated for it.

9 Q Is that also true in the Wireless
10 Developer?

11 A Yes, it is.

12 Q Mr. Faxon, there are 57 other agreements
13 attached to and listed in the summary. We are not
14 going to go through them.

15 A Thank you.

16 Q Are the two that we have reviewed
17 representative of the other agreements in the
18 summary and attached to?

19 A Yes, they are.

20 MR. BLOCH: Your Honor, I am going to move on
21 to the new digital media agreements which are
22 current and were covered by your ruling subject to

1 protective order.

2 Is this an appropriate time to request that
3 people not covered by the protective order be asked
4 to leave?

5 CHIEF JUDGE SLEDGE: There is never
6 appropriate time to request that.

7 MR. BLOCH: Well, given the Court's ruling on
8 the protection for this, I will ask Mr. Faxon
9 about the terms of these agreements, I would like
10 to have people not covered by the protective
11 order.

12 CHIEF JUDGE SLEDGE: That is your right
13 although may not be the appropriate time.

14 Given the hour, we will recess for 10 minutes,
15 and when we reconvene we will be subject to the
16 protective order.

17 (Whereupon, a break in the
18 proceedings.)

19 CHIEF JUDGE SLEDGE: Come to order.

20 BY MR. BLOCH:

21 Q Mr. Faxon, are you familiar with EMI's
22 new digital media agreements or NDMAs?

1 A Yes.

2 Q What are they?

3 A They are agreements with three of the
4 major record groups related to a range of on-line
5 and physical products.

6 Q With whom has EMI Music Publishing
7 entered into these agreements?

8 A They were entered into with Sony BMG,
9 Warner Music and Universal Music.

10 Q Have you reviewed each of these
11 agreements?

12 A I have.

13 Q What products are covered by these
14 agreements?

15 A There is locked content and in that
16 connection dual discs in particular. There are
17 Ring Tones and Master Tones and video product and
18 similar products of that sort.

19 Q What is locked content?

20 A Locked content is where there is content
21 that is distributed, let's say a song that is
22 distributed to a consumer in which they do not

1 have access to, unless it is unlocked, it is made
2 available to them either for a separate fee or for
3 other consideration.

4 Q At the time these agreements were
5 negotiated and entered were these products subject
6 to mechanical royalty under Section 115 of the
7 Copyright Act?

8 A The so-called lock content in
9 multisession certainly was, and as you know, as I
10 said earlier we did not believe that the written
11 Master Tone licenses were subject to 115 and
12 certainly the video uses, I don't think anybody
13 would suggest are subject to 115.

14 Q What time period were these three
15 agreements entered?

16 A From 1994, I guess, through 2004. I am
17 always off a decade. Characteristic of my age.
18 2004, 2005.

19 Q I want you look at what was submitted as
20 Exhibit C 0219 to your written statement, which is
21 in Trial Exhibit 3.

22 A Yes.

1 Q What is that?

2 A This is the NDMA with respect to Sony
3 BMG Music Entertainment.

4 Q Are you familiar with the terms of this
5 agreement?

6 A I am.

7 Q Were you involved in the negotiation of
8 this agreement?

9 A This agreement was negotiated with my
10 knowledge. I followed in detail the evolution and
11 negotiation.

12 Q Did you review the final agreement
13 before it was signed?

14 A Yes, I did.

15 Q If you will look at the first page, what
16 is the stated purpose of this agreement?

17 A The stated purpose of this agreement is,
18 was to essentially unlock a blockage for the, that
19 the industry was experiencing where disputes over
20 rates and rights limited the availability of
21 content to go into on-line digital and even into
22 physical markets.

1 The aim was to open up those markets by
2 resolving those differences so that we could
3 actually have a real distribution of real product,
4 for real compensation.

5 Q Would you go to pages 14 and 15,
6 specifically Section 2.4.3?

7 A Right.

8 Q Would you look at the agreement and tell
9 the Court what the royalty rate is for Master
10 Tones?

11 A The royalty rate is 10 percent of the
12 retail price. Maybe it is best to state it this
13 way. It was a three-tiered pricing the higher of
14 the three tiers. Ten percent of retail price, 20
15 percent of the royalty pool, if the, if Sony BMG
16 was not the direct seller of the Master Tone, and
17 a minima, which ranged from 10 cents for product
18 that was priced at a dollar or less or 12.5 cents
19 if it was priced at a dollar or more.

20 Q Did Sony BMG pay an advance under this
21 agreement?

22 A Yes, they did. They paid a \$5 million

1 advance.

2 Q Does the agreement also provide royalty
3 rates for Master Tones that were sold in
4 connection with subscriptions?

5 A Yes, it did.

6 Q Go to page 16 and 17.

7 A Yes. Those rates which followed the
8 same pattern as the rates we just talked about, a
9 three tiered, the higher of the three tiers, and
10 it related to 10 percent of the revenue base, 10
11 cents per product transmitted and 10 cents rising
12 to 12.5 cents if the product base was more than a
13 dollar.

14 Q Did the agreement also deal with
15 controlled compositions?

16 A It did with respect to master tones.

17 Q How so?

18 A It was agreed that control composition
19 reductions in the royalty would not apply in
20 Master Tones.

21 Q Would you look at pages 13 and 14,
22 please, Section 2.4.2.2?

1 A Yes.

2 Q Tell us if that is the section which
3 deals with this subject?

4 A Yes. Yes, it is.

5 Q What is the current status of the Sony
6 BMG agreement?

7 A This agreement continues to run through
8 much of this year.

9 Q So it is current --

10 A It is current.

11 Q -- in 2008?

12 A It is. As we speak it is still in
13 operation.

14 Q I would like you to look at what was
15 submitted as Exhibit Copywriter Owners' 220 to
16 your written statement. It is a part of Trial
17 Exhibit 3. Can you tell us what that is?

18 A That, again, is a new digital media
19 agreement, an NDMA, this time with respect to UMG
20 or Universal Music Group.

21 Q Were you involved in the negotiation of
22 this agreement?

1 A Yes. It's final negotiation was during
2 my tenure when I returned to EMI Music Publishing.

3 Q Did you review the final agreement
4 before it was signed?

5 A I did.

6 Q What was the stated purpose of this
7 agreement?

8 A It was similar. It was exactly for the
9 same reason that we went into the Sony BMG. It
10 was to assure that we would resolve industrywide
11 disputes or disputes, actually, between us and
12 major players in the industry so that products
13 which contained our songs would be able to enter
14 into the marketplace, and we will develop revenue
15 streams, legitimate revenue streams.

16 Q What products are covered by this
17 agreement?

18 A Again, the same body of enumerated
19 activities: Multisession, dual discs, Master
20 Tones, video, and the live rights.

21 Q Go to pages 23 and 24. Can you tell the
22 Court what the royalty rate is for Master Tones?

1 A Yes. Again, in this agreement as with
2 the previous, it is a three-tier approach to
3 identifying the appropriate royalty, the higher of
4 10 percent retail selling price, paid portion of
5 the so-called revenue pool, which would equal to
6 20 percent of what UMG would have received, if it
7 was not the direct seller with a, here described
8 as a floor but a minima of 10 cents rising to 12.5
9 cents.

10 Q What were these rates based on?

11 A As with the other, in the Ring Tone
12 world and Master Tone world, it is based upon the
13 deals that we were able to enter into with a very
14 wide variety of other services. By the time we
15 got to Universal, it was based upon what we were
16 able to achieve with Sony BMG.

17 Q Did this agreement provide any royalties
18 for Master Tones sold in connection with
19 subscriptions?

20 A Yes, it did.

21 Q Look at pages 25, 27, Sections 2.4.3.3
22 and 2.4.3.5. Can you tell us if this is covered

1 by these sections?

2 A Yes, it is.

3 Q What are the rates?

4 A Again, 10 percent. Again a tiered rate.
5 10 percent of the retail price or again 10 cents
6 rising to 12.5 cents with a revenue pool
7 calculation of 20 percent of the revenue,
8 so-called revenue pool.

9 Q If you would, would you look at
10 Copyright Owners 221 to your written statement,
11 which is Trial Exhibit 3.

12 A Right.

13 CHIEF JUDGE SLEDGE: Before you leave that,
14 you didn't get the question that was the
15 concluding of the last exhibit. Is this agreement
16 still current?

17 THE WITNESS: Yes, it is still current.

18 CHIEF JUDGE SLEDGE: Through when?

19 THE WITNESS: I am going to get this a little
20 confused. It is either June of this year or it is
21 December of this year. I'm not sure. Certainly,
22 it is not going to complete tomorrow.

1 BY MR. BLOCH:

2 Q Look at Copyright Owners' 221. Can you
3 tell us what that is?

4 A This is the third in the series, which
5 is a similar agreement with Warner Music Group.

6 Q When was this entered?

7 A This was entered into in August of 2005.

8 Q Were you involved in the negotiation of
9 this?

10 A Yes, I was.

11 Q Did you review the final agreement
12 before it was signed?

13 A I did.

14 Q What is the stated purpose of this
15 agreement?

16 A This agreement is, in fact, the same
17 approach that we took with the others, which was
18 to try and assure that we would unlock, unblock
19 the distribution of our music through, in
20 association with the master recordings of Warner
21 Music so that a legitimate market would develop,
22 and we would actually see revenue.

1 Q Now, you have referred to this several
2 times. You said that the market would be
3 unblocked. In what way was it blocked?

4 A There were disputes over each of the
5 products that I have enumerated, in the instance
6 of Ring Tones and Master Tones, whether or not
7 they were subject to a compulsory license or not.
8 Those disputes disrupted the marketplace and
9 essentially the record labels were withholding
10 their master rights in connection with the
11 licensing of our songs.

12 You can't have a song without a master for a
13 Master Tone. That's sort of what the applied
14 definition are.

15 They also took the position with respect to
16 lot content and the so-called dual discs, that
17 they needed to have a reduction in the royalty due
18 in those formats in order to make those discs
19 economic, and therefore, they believe they could
20 distribute those without having a concession.
21 That is certainly the representation made to us.

22 Q Based on your experience with these

1 agreements, was the market unblocked?

2 A It certainly was unblocked. I think the
3 dual discs has been a disappointing product, but
4 it did allow the record industry to put those
5 discs out and see if the consumers would accept
6 them.

7 The multisession and the blocked purchase are
8 still being utilized quite extensively, and the
9 Master Tone tones are being well distributed into
10 the marketplace.

11 Q Are you familiar where the terms of this
12 agreement?

13 A Yes.

14 Q Go to pages 21 and 22.

15 A I should add -- Well, I guess I
16 shouldn't add. Sorry.

17 Q You wanted to add something to your last
18 answer?

19 A No. It will be extraneous. It is
20 important but extraneous.

21 Q First of all, are the products covered
22 under this license agreement the same?

1 A Yes. They are.

2 Q If you would go to pages 21 and 22 of
3 Exhibit A to the cover letter. Can you tell the
4 Court what the royalty rate is for the Master
5 Tone?

6 A Yes. The royalty rate is, again, a
7 three-tier price; 10 percent of the retail selling
8 price, 20 percent of the what I will call the
9 revenue, the royalty pool. If Warner music is not
10 directly licensing the works with a floor of 10
11 cents at a dollar, 11 cents above that, between
12 \$1.10 and \$1.20, and 12.5 cents above \$1.20.

13 These replaced the rates that, again, we
14 referred to earlier today, the Warner special
15 markets where the minima there was 20 cents.

16 Q Did this agreement provided any
17 royalties for Master Tones sold in connection with
18 subscriptions?

19 A Yes.

20 Q Look at Section 13 of Schedule 1 to the
21 letter, 2.3.3.4.

22 A Yes.

1 Q Is that the section that covers --

2 A Yes, it is.

3 Q What were the royalties?

4 A The royalties there were the -- were as
5 mentioned before, they are 10 percent of the
6 retail price and a share of the pool based upon a
7 20 percent share of the pool.

8 Q What is the current status of this
9 agreement?

10 A This agreement as well, is also enforced
11 and we are operating under it.

12 Q At the time that EMI Music Publishing
13 entered into these three NDMAs, what was the
14 statutory mechanical rate, if you know?

15 A It was -- it rose to from 8.5 cents to
16 9.1 cents, depends on the term -- the period.

17 Q So, at the time these were entered, it
18 was 8.5 cents?

19 A Yes, it was.

20 Q To your knowledge were these three
21 agreements voluntarily negotiated at arm's length
22 by EMI Music Publishing and each of the record

1 companies?

2 A Couldn't have been a more arm's length
3 transaction than these.

4 Q I would like you to look at what was
5 submitted as Copyright Owners 222 to your written
6 statement, which is part of Trial Exhibit 3.

7 A Yes.

8 Q Can you tell us what that is?

9 A Yes. This is an agreement between Skype
10 Communications and EMI. Skype is a voice-over
11 Internet protocol business and at the time and
12 continues to be through was owned by Ebay.

13 Q Were you involved in negotiating this
14 agreement?

15 A Yes, I was.

16 Q Did you review and approve the final
17 agreement?

18 A I did.

19 Q When was the agreement with Skype
20 entered?

21 A It was in April of 2006.

22 MR. BLOCH: Your Honor, I want to mention

1 that in the original submission in November 2006,
2 we had difficulty finding an executed copy of this
3 agreement, so the one that is submitted was
4 unexecuted.

5 For convenience, we put behind that exhibit --
6 we were able to find an executed copy which is
7 identical, and I have just included it for
8 completeness.

9 BY MR. BLOCH:

10 Q What products are covered by this
11 agreement?

12 A It covered Master Tones and Ring Tones
13 and Ring Backs which are an associated product,
14 the permanent downloads and on demand streams.

15 Q What is the geographic scope of this
16 agreement?

17 A It is worldwide. It is unusual
18 agreement in that respect.

19 Q What rights are covered by the
20 agreement?

21 A Rights are mechanical rights and
22 performing rights.

1 Q Why were both mechanical and performing
2 rights negotiated in this?

3 A In order to assure that they could
4 effectuate a worldwide distribution of these
5 works, it was necessary to include both.

6 Q Turn to page 4 of the agreement, please.

7 CHIEF JUDGE SLEDGE: Mr. Bloch, you have now
8 left the judicial media agreement?

9 MR. BLOCH: Yes, your Honor.

10 THE COURT: The protective order is no longer
11 in effect.

12 MR. BLOCH: Excuse me, your Honor, but I
13 believe it covered current agreements which would
14 include the Skype --

15 CHIEF JUDGE SLEDGE: The motion applied to
16 judicial media agreements. The protective record
17 is now --

18 MR. BLOCH: I would like to renew my motion,
19 your Honor, to apply the protective order to the
20 discussion of the Skip agreement, and I plan to
21 ask Mr. Faxon about the Sprial agreement which is
22 also a current agreement, and remain in effect for

1 those two as well.

2 CHIEF JUDGE SLEDGE: Why?

3 MR. BLOCH: Because they are non-public and
4 they have highly confidential financial terms in
5 them.

6 JUDGE ROBERTS: You say current?

7 MR. BLOCH: Yes, they are.

8 CHIEF JUDGE SLEDGE: At this time the motion
9 is denied. We will see where you are going with
10 your questions.

11 MR. BLOCH: Well, the question that was
12 pending, I was going to ask Mr. Faxon to look at
13 page 4, which is the section on royalties. I was
14 going to ask him to tell us what royalty rates
15 are, so I would like to renew my motion.

16 CHIEF JUDGE SLEDGE: You haven't established
17 the application of a protective order from your
18 testimony.

19 MR. BLOCH: My understanding, your Honor, was
20 that it applied to contracts which were current.

21 CHIEF JUDGE SLEDGE: You haven't established
22 that.

1 BY MR. BLOCH:

2 Q Mr. Faxon, when was this agreement
3 entered?

4 A I believe I answered that. It was April
5 of 2006.

6 Q Is it currently still in effect?

7 A Yes, it is.

8 CHIEF JUDGE SLEDGE: Any objection to the
9 motion to apply the protective order.

10 MR. CONNOLLY: Not from DiMA, your Honor.

11 MR. SMITH: No, your Honor.

12 THE COURT: Without objection, the motion is
13 granted.

14 MR. BLOCH: Thank you, your Honor.

15 BY MR. BLOCH:

16 Q Mr. Faxon, would you please turn to
17 page 4 and tell the Court what the royalty rates
18 are in the agreement for conditional downloads?

19 A Yes. A conditional download is 15
20 cents. There's 15 percent of the subscription
21 revenue. There is a provision to negotiate for a
22 percentage of the context revenues and I will come

1 back to that in a moment to clarify. Then there
2 was a floor or penny rate, if you will, of
3 two-tenths of a cent per month for each
4 conditional download.

5 The reason that we did not negotiate a
6 percentage of the revenue pool is the Skip is the
7 direct distributor and is not an intermediary. If
8 there was, if there were to act as an
9 intermediary, then we would have had to go back
10 and we would have gone back and negotiated that
11 term.

12 Q If you will look at page 4, the
13 provision at the bottom, 6A (iii). Does that deal
14 with the subject of free or promotional goods?

15 A Yes, it most certainly does.

16 Q How does that work in context of this
17 agreement?

18 A We, there is no provision in this
19 agreement to allow -- They are not allowed to
20 offer or not pay based upon free goods or bonus or
21 promotional goods.

22 Q You said earlier that the agreement

1 covered both mechanical and performance rights?

2 A Correct.

3 Q I would like you to look at the last
4 provision on page 4. I will ask you if you can
5 explain to us what that provision does?

6 A Yes. What it does is it, it allocates
7 between the performing right and the mechanical
8 right the revenues generated. It does so on a
9 two-thirds, one-third basis. So two-thirds of the
10 revenue generated from conditional download is
11 attributable to the mechanical right; and
12 one-third of the revenue is attributable to
13 performances.

14 Q Why is that allocation like it is?

15 A It has a number of applications and
16 reasons for being -- Well, its initial reason for
17 being is that in our relationships with our
18 songwriters our deals are constructed around
19 rights types, it is important for to us negotiate,
20 in effect, separately with respect to each of
21 those rights because the splits are different or
22 it can be different.

1 It is also important for the operation of
2 the, of this agreement as it is a worldwide
3 agreement, that it has to interact with societies
4 around the world, and as you will read through
5 agreement you will see that there are mechanisms
6 to do that, and it has to be, it needs to be
7 consisted with the rules that generally apply not
8 exclusively, but generally apply.

9 Those are the two reasons.

10 Q If you will look at page 6 of the
11 agreement, to the title "Master Tone Royalties"?

12 A Yes.

13 Q What royalty rates in the agreement for
14 Master Tones?

15 A 15 percent. Again, we have left open
16 the question of the percentage of the royalty pool
17 for the reason I mentioned before, which is they
18 are a direct seller. Therefore, they are not
19 receiving royalties for themselves. A floor of 15
20 cents for the Master Tone.

21 Q Does the agreement cover both mechanical
22 and performance rights with respect to Master

1 Tones?

2 A Yes, it does.

3 Q How are the rights for each right
4 allocated?

5 A In the same manner as I just reflected
6 for conditional downloads.

7 Q Turn to page 7, iv, down towards the
8 bottom. Is that the provision that you are
9 referring to?

10 A Yes, that is indeed the provision that
11 relates.

12 Q At the time that EMI Music Publishing
13 entered into this agreement, what was the
14 statutory mechanical rate?

15 A This would have been 9.1 cents.

16 Q I would like to, for you to look at what
17 was marked as Copyright Owners' 223 to your
18 written statement, which is Trial Exhibit 3. Can
19 you tell us what this document is?

20 A This is an agreement with Mowan, Inc.,
21 which is otherwise worth, interestingly known as
22 Spiral Frog which is an on-line service.

1 Q When was this agreement entered?

2 A This agreement was entered into also in
3 April of 2006.

4 Q Is it currently in effect?

5 A It is currently in effect, yes.

6 MR. BLOCH: Your Honor, I would request the
7 application of protective order to this portion of
8 Mr. Faxon's testimony.

9 CHIEF JUDGE SLEDGE: Objection?

10 MR. CONNOLLY: Not from here.

11 MR. SMITH: No, your Honor.

12 CHIEF JUDGE SLEDGE: Without objection, the
13 motion is granted.

14 BY MR. BLOCH:

15 Q What does a digital music service do,
16 Mr. Faxon?

17 A This service is a new business model and
18 it is applying advertising. It is supplying music
19 through a subscription service to consumers based
20 upon an advertising model. So in other words, its
21 revenue does not get paid direct. Revenue doesn't
22 directly come from consumers. Comes by virtue of

1 advertising associated with a subscription
2 service.

3 Q Were you involved in the negotiation of
4 this agreement?

5 A I was.

6 Q Did you review and approve the final
7 form of the agreement?

8 A I did.

9 MR. BLOCH: Your Honor, when we submitted
10 this contract, we were unable at the time to find
11 an executed version. We have subsequently done
12 that, and for completeness have attached behind
13 the originally submitted document.

14 BY MR. BLOCH:

15 Q What products or services are covered by
16 this agreement?

17 A This is a service that is for the
18 delivery of digital files, so it is a download and
19 a conditional download service.

20 Q What rights are covered by the
21 agreement?

22 A Mechanical right.

1 Q Please turn to Section 6.1?

2 A I'm sorry, I should have added that
3 there is lyric, lyrics are also included in the
4 right, to reproduce lyrics is included in this
5 agreement.

6 Q Turn to Section 6. Under 6.1, can you
7 tell the Court what the royalty rates in the
8 agreement are for limited downloads?

9 A It is 10 percent of the retail value.

10 Q What are the royalty rates in the
11 agreement or streams?

12 A They are the same.

13 Q Did Spiral Frog pay EMI an advance?

14 A Yes, they paid us \$1 million or they
15 committed to pay us \$1 million. We have not
16 received the entirety of the advance.

17 Q Did the agreement provide for any
18 minimum royalty?

19 A No, it did not.

20 Q Do you know how the rate for limited
21 downloads was set or what it was based on?

22 A It was based upon the, our experience in

1 the marketplace as to what rates would be
2 acceptable, and our experience with other
3 services.

4 Q At the time this agreement was entered,
5 what was the mechanical?

6 A This would have been 9.1 cents.

7 Q What other types of licenses does EMI
8 Music Publishing issue?

9 A We issue licenses, as I said, for a wide
10 variety of uses. The biggest other category
11 absent the performing rights is our
12 synchronization rights.

13 Q Do you know roughly how many EMI has
14 entered into over the last ten years?

15 A Of synchronization?

16 Q Of synchronization?

17 A Thousands.

18 CHIEF JUDGE SLEDGE: The protective order is
19 lifted.

20 BY MR. BLOCH:

21 Q I would like you to look at Exhibit CO
22 224 to your written statement, which can be found

1 as part of Trial Exhibit 3.

2 A Yes.

3 Q Can you tell us what that exhibit is?

4 A That is a license between entities that
5 are related to EMI Music Publishing. That music
6 is an affiliate of (Joe Beck and Black Bow Music)
7 with 20th Century Fox in relation to a licensing
8 of Steve Wonder song, "Higher Ground."

9 Q How many agreements are a part of this
10 exhibit?

11 A There are three agreements that are a
12 part of this exhibit.

13 Q Three separate sink licenses?

14 A Three separate sink licenses. The
15 first, as we just indicated, was with 20th Century
16 Fox for a Steve Wonder song called "My Name is
17 Earl." "Higher Ground" for a program, an episode
18 program for "My Name is Earl," a TV series.

19 The second is for an advertisement, a
20 commercial, also a Steve Wonder song, "Uptight,
21 Everything is All Right. "Not only Steve Wonder
22 but Sylvia (Moy) and Henry Crosby. I have to be

1 careful about that. They are songwriters hall of
2 fame writers. So that was with respect to a
3 commercial.

4 Then the third in this series is a song that
5 is a Farrell Williams, Shawn Carter and Chad Hugo
6 song called "I Heard Enough of That," and that is
7 with respect to a motion picture.

8 Each of those are three different kinds of
9 synchronization, synchronization agreements.

10 Q Were you involved in negotiation of
11 these synchronization licenses?

12 A Each of these synchronization licenses
13 would have required my approval for the quotation
14 and my approval for the final agreement.

15 Q What is the time period covered by these
16 agreements?

17 A 2006. Think are all in 2006.

18 Q Do you know whether they are current
19 agreements?

20 A They continue in force because the
21 licenses for each of them continue in force
22 generally for as long as, or certainly in terms of

1 the motion picture, as long as the motion picture
2 is in release or is active exploitation.

3 That's true also of the television
4 production. The question of the commercial is --

5 Q Did you finish the answer?

6 A I didn't, because I did not review this
7 with respect to its term.

8 Typically, commercials tend to -- one year.
9 It is a term of one year. I don't know whether it
10 was renewed, which is not uncommon for it to
11 happen. So the year would be one year to
12 April 23rd, 2007.

13 Q If you will look at the first license
14 between (Joe Beck and Black Bow Music) and 20th
15 Century Fox?

16 A Yes.

17 Q The song that is being licensed there,
18 is that "Higher Ground"?

19 A Yes.

20 Q If you will look at number 5 on the
21 first page?

22 A Yes.

1 Q Does that indicate what the term is?

2 A Yes. Perpetual. Each of the other two
3 agreements has, in effect, a perpetual license, as
4 long as, and the terms will go on to suggest as
5 long as it is within the context of the entirety
6 of the linear program.

7 Q How is the royalty rate for this type of
8 license established here?

9 CHIEF JUDGE SLEDGE: Be careful not to lead
10 the witness.

11 THE WITNESS: How is the rate negotiated?

12 BY MR. BLOCH:

13 Q Yes. How is the rate established?

14 A It is a direct negotiation between, in
15 this case, 20th Century Fox and ourselves based
16 upon, obviously, each of our histories of
17 negotiating such matters.

18 So it is an arm's length. Well, I hesitate to
19 use the word market, free market determined value.
20 A willing buyer and a willing seller came to an
21 agreement.

22 Q Are the synchronization licenses subject

1 to such.

2 A No.

3 Q If you turn to page 3, paragraph 13.

4 Can you tell us what does this provision cover?

5 A This covers a term that is typically in
6 these agreements which is to assure that the
7 master recording is not accorded a greater fee
8 than the underlying composition. Effectively, it
9 is the structural way to get to a 50/50 sharing of
10 the overall licensing fee with respect to this
11 report.

12 Q Who shares 50/50?

13 A The owner. The other side is the owner
14 of the master recording, easier said, the record
15 company.

16 Q How much does the music publishing
17 company get?

18 A In this case, this was a license for
19 \$10,000, the presumption is that the record
20 company also got \$10,000 for their recording.

21 Q What is the effects, specifically, of
22 this provision?

1 A The effect of this provision is to
2 assure that there is a 50/50 split in the overall
3 licensing fee for these uses.

4 Q Do the other two licenses have similar
5 provisions?

6 A Yes, they do. They are very typical,
7 more than typical. They are almost consistently
8 included in the source of licenses.

9 Q Are you familiar with the RIAA's
10 proposed rates for physical product?

11 A I am.

12 Q What is your understanding of its
13 proposal?

14 A Its proposal is to move away from a
15 penny rate to a percentage of wholesale with no
16 floor.

17 Q As a music publisher, if the RIAA
18 percentage of revenue rate were set for physical
19 product, how would that affect EMI's music
20 publishing business?

21 A Well, I think there are several aspects
22 to answer to that question. One is that as a

1 practical matter, it would be hugely disruptive to
2 our contractual relationships. We have 700 active
3 songwriters and a large number of inactive
4 songwriters.

5 All of those agreements were written with a
6 penny rate as a basis, penny rate for physical
7 goods as a basis. That would obviously have to be
8 renegotiated; and I think it is a practical
9 reality would be an impossibility. So that is one
10 aspect.

11 Q Let me ask you a question. Why would
12 that be impossible?

13 A Well, 700 agreements, reaching agreement
14 with 700 different people for your active
15 agreement and try to get that to, to resolve that
16 reasonably and rationally seems unlikely. It is
17 hard enough to do one agreement, 700 is --
18 especially if it retroactively applies.

19 Q Yes.

20 A Economically, obviously a lower -- as I
21 have looked at the proposal, it is the calculation
22 of the royalties would mean a very, very

1 substantial reduction in mechanical royalties
2 payable for the songs we represent. That would
3 have a range of adverse impacts.

4 One, obviously we will not be recouping, we
5 may not recoup. We certainly would be in a
6 position where it would be unlikely we would
7 recoup all of the monies that we now have
8 outstanding.

9 It would certainly delay it, meaning even if
10 they were recoupable, because you have to sell that
11 many more records in order to get the money back.

12 Both of those things would reduce the amount
13 of capital that we would have available to put
14 back out into the marketplace in order to support
15 songwriters and to develop additional content for
16 the marketplace. So, for us it would take a
17 sledgehammer to our business.

18 Q Are you familiar with the NMPA's rate
19 proposals for this proceeding?

20 A Yes, I am.

21 Q Is it your understanding that the NMPA
22 proposes a percentage of revenue rates for limited

1 downloads, interactive streaming, and Ring Tones?

2 A Yes.

3 Q Isn't that proposal likely to be as
4 disruptive to your business as the RIAA and DiMA
5 percentage of revenue proposals for physical
6 product and other --

7 A Well, two --

8 CHIEF JUDGE SLEDGE: Mr. Bloch, please do not
9 lead the witness. Let's let him rephrase the
10 question.

11 BY MR. BLOCH:

12 Q What impact, if any, would the NMPA
13 proposal have on EMI's business insofar as it
14 dealt with the percentage of revenue?

15 A I think there are two things. One is
16 that NMPA also includes a minima. So it does
17 protect the bottom end of the possibilities, and
18 therefore, it does act as a protection. An opened
19 ended, no minima deal allows businesses to use our
20 content and effectively transfer value elsewhere.
21 That is something we fight against every day.

22 Second, the absolute amount of the revenue,

1 assuming that the prices, retail prices hold and
2 wholesale prices hold, will be a meaningful
3 reduction. So those have real impacts on us and
4 have the same sort of issues that, from the
5 standpoint of what the RIAA and DiMA suggested.

6 The amounts that are with respect to the
7 NMPAs are variable at one level to a floor. It
8 meets the test, I believe, of the intrinsic value
9 and the contributory value that is required in any
10 negotiation for a price.

11 How does it affect our contracts? We have
12 for now for a number of years been able to account
13 for on-line revenues alongside the revenues in the
14 construct of our agreements.

15 So we do not think it will be disruptive to
16 have a percentage with a minima to our agreements.
17 In fact, it is obvious from what we have gone
18 through in these last hours or several hours, that
19 is the way we constructed most of the EMI's on-line
20 agreements, on-line and digital agreements.

21 THE WITNESS: Yes.

22 JUDGE ROBERTS: But for the streaming, for

1 the Ring Tones and the traditional downloads you
2 don't have to go back.

3 THE WITNESS: No.

4 JUDGE ROBERTS: To renegotiate 700 agreements
5 and that is because you don't have 700 agreements
6 with respect to those?

7 THE WITNESS: No, it is not. Our agreements
8 are written with a predicate. The predicate is
9 when somebody delivers a song it represents X
10 pennies so you go as a benchmark to whatever the
11 penny rate is at that time.

12 JUDGE ROBERTS: Yes.

13 THE WITNESS: So it is establishing or it is
14 the construct of the agreements, so if there is a
15 penny rate in the physical world which is what the
16 penny rate relates in our agreements, then our
17 agreements work.

18 So if you were to cut the penny rate in half,
19 in effect, what has to happen is that the
20 songwriter has to deliver twice as many songs that
21 are recorded and released in accordance with their
22 agreement because it has to add up to a certain

1 numbers of pennies in their agreement.

2 So if you eliminate that, then what is the
3 benchmark? When does a writer know whether or not
4 they have submitted the requisite number of
5 compositions and when have they fulfilled their
6 requirements?

7 On the reverse we have to know those things to
8 administer and know those, so we have to
9 renegotiate those core elements of the arrangement
10 between us. It's a historic fact. Almost 100
11 years of history that the predicate of our industry
12 was a penny rate. That's why our agreements are
13 structured the way they are.

14 It would be very disruptive. Other revenue
15 comes in synchronization, or performances, they
16 come in as a consequence of delivery of the songs.

17 So if on-line revenue comes in it can be
18 properly accounted for to the songwriters depending
19 on the structure of their agreement.

20 But the basic predicate of the agreement
21 is, "You deliver me so many songs with so many
22 pennies associated with them." It is exactly the

1 way it is written.

2 So I have to go to everyone of them and
3 renegotiate that. I'm not sure on what basis by
4 the way.

5 JUDGE ROBERTS: I believe in the NMPA's
6 proposal it is a penny rate for the physical.

7 THE WITNESS: Yes.

8 JUDGE ROBERTS: And a penny rate also for a
9 digital phonorecord delivery.

10 THE WITNESS: Right.

11 JUDGE ROBERTS: Why can't we just set a penny
12 rate for the physical and do something else with
13 the digital phonorecord delivery? Why do we have
14 to do both of them at a penny rate?

15 THE WITNESS: I would say, and maybe my
16 colleagues may disagree with me, but I don't think
17 you do need to do the same thing.

18 The integrity for the purpose of what we are
19 talking about here, meaning that the integrity of
20 the agreements, I don't think you need to have a
21 single penny rate for a digital download if you
22 have the penny rate for the physical world.

1 Some might argue that over time that will
2 erode, if there is no physical world, but I think
3 in terms of how these proceeding affects it will
4 definitely be a physical distribution world.

5 I think there may be other arguments as to why
6 the penny rate is more appropriate than in the
7 digital download.

8 JUDGE ROBERTS: Thank you.

9 BY MR. BLOCH:

10 Q Mr. Faxon, on several occasions you
11 alluded to the fact that EMI Music Publishing
12 wasn't getting paid royalties on time.

13 Describe to the Court, please, EMI Music
14 Publishing's experience over the last five years
15 with record labels in terms of their royalties to
16 EMI Music Publishing?

17 A Our experience is that payments tend to
18 be late. They tend to be not complete. They tend
19 to be inaccurate. They tend to be deductions
20 which are not authorized by the licenses, so all
21 of those things happen.

22 In the on-line world that has the impact of

1 where it has been substantially higher than it is
2 in the physical world but it is still meaningful.

3 We have an entire department that is
4 dedicated to tracking the difference between what
5 has sold in the marketplace and we have been paid
6 on and the amounts of difference are huge and as a
7 percentage the amounts of difference in the
8 on-line world is unimaginable.

9 It is very hard to understand why it is that
10 a song that is sold on iTunes, with an all
11 inclusive rate to a record company, cannot be then
12 paid on to the publisher because of the
13 relationships they have with the physical world
14 they do it all the time.

15 So why is it higher, I cannot tell you, but I
16 can tell you as a fact that we not being paid that
17 amount that would be due in consideration of the
18 sales of DPDs in accordance with the agreements
19 that we have with the licenses that are
20 outstanding.

21 Q I would have you look at what is
22 submitted as Exhibit C0 225 to your written

1 statement which is part of Trial Exhibit 3.

2 A Yes.

3 Q Tell us what this is, please.

4 A Yes, as we discussed before. This was a
5 document that was put together to enable us to
6 understand how we could best monitor and track the
7 revenues that were due us under the NDMAs, and
8 basically in that connection we tried to identify
9 those proxies, if you will, for what the revenue
10 should be.

11 There is external information and we will
12 come to that in another exhibit, but in the Ring
13 Tone in the mobile world, and certainly at the
14 time we did this, there was no independent source
15 of information on sales.

16 So instead what we did is we looked, and
17 said, "What other proxy can we have?" Well, the
18 RIAA has a process whereby they certify gold and
19 platinum, et cetera, for master tones.

20 The record labels have to, in fact, certify
21 they have sold 500 million Ring Tones or master
22 tones in order to be awarded the certificate.

1 They tested it and this is an audited process,
2 and it is a very rigorous process, so what we did
3 was we said, "All right, let's look at those.
4 Let's see if we got paid on them and what we should
5 have been paid on them," and as you can see at the
6 top of the first page which is . . .

7 MR. BLOCH: I don't want to interrupt you,
8 but I want make application concerning the
9 protective order on this, and before I do that,
10 let me ask you this.

11 BY MR. BLOCH:

12 Q Can you tell the Court when this was
13 prepared?

14 A It says that it was as of October 16,
15 2006.

16 Q Which NDMA agreement does this document
17 relate?

18 A To all three. Each of them have this
19 sort analysis that has been done with respect to
20 them, and the reason is, operationally, what we
21 are trying to do is we are trying to create a
22 systematic approach to being able to manage these

1 agreements and to the extent they are common that
2 this allows us a level of efficiency.

3 Q Is this a public document?

4 A No, it is not.

5 MR. BLOCH: Your Honor, I would like to
6 request an application for a protective order as
7 to the discussion of financial details of this
8 document which is an EMI internal document that is
9 related to current NDMA agreements.

10 CHIEF JUDGE SLEDGE: Is there an objection to
11 the motion?

12 MR. SMITH: I would endorse the motion. This
13 appears to try to reflect payments by the record
14 companies to the publisher, your Honor.

15 CHIEF JUDGE SLEDGE: It is surprising that
16 you would want to hide from the public your
17 payments as it seems this would be something that
18 your companies would like to take credit for.

19 MR. CONNOLLY: On behalf of DiMA we don't
20 object. We are not a really a party to these
21 matters.

22 CHIEF JUDGE SLEDGE: Without objection the

1 motion is granted.

2 BY MR. BLOCH:

3 Q Mr. Faxon, you were starting to refer to
4 a specific aspect of this.

5 A Yes. If you will look, and there are
6 similar legends on other pages of other businesses
7 here, but for Universal, or rather I mean for Sony
8 BMG, you will see just above "block agreement
9 terms," and it's marked on mine, so I suspect it
10 is marked on yours there are additional monies due
11 equal based on RIAA certification levels with
12 estimates where we still to an additional \$700,000
13 of which \$76,000 is with respect disputed titles,
14 or in other words, there are titles where they
15 split between songwriters that hasn't yet been
16 resolved, and therefore sometimes there is a
17 reason for record labels where they take a reason
18 not to pay on those.

19 So it is some where between \$600,000 and
20 \$700,000 just based on the certification.

21 That assumes that every one of the records
22 that was certified, and the numbers of units that

1 we should have been paid on was precisely 500,000
2 and it was a gold or precisely 1 million if it was
3 platinum.

4 We are certainly not naive enough to believe
5 that those numbers were exactly on those numbers.
6 This is a very conservative number and it only
7 reflects those that are certified.

8 The amounts of money that was not yet
9 accounted to us for our songwriters in my view and
10 in my judgment was many times this amount. We can
11 see similar things elsewhere as well.

12 Q With respect to the Warner NDMA
13 agreement.

14 A Warner. Yes.

15 Q Can you tell the Court how much
16 additional money EMI believed it was due based on
17 the RIAA certification at this time?

18 A Yes, for Master Tones at that time we
19 believed that we had not received \$834,000.

20 Q Mr. Faxon, I would like you to look at
21 what was submitted as Exhibit CO 226 to your
22 written statement.

1 CHIEF JUDGE SLEDGE: The protection order is
2 lifted.

3 BY MR. BLOCH:

4 Q Which is Trial Exhibit 3.

5 A Yes.

6 Q Can you tell the Court what this
7 document is, please.

8 A This document is what is called a DPD
9 royalty shortfall analysis. It is a tracking
10 report in trying to determine how much monies we
11 are due on DPDs that have been distributed into
12 the marketplace, how much was due, and how much we
13 had not yet been paid on that was otherwise due.

14 Q What is the date of this document?

15 A October 11, 2006.

16 Q Did you receive it?

17 A Yes, I did.

18 Q How often do you receive a document like
19 this?

20 A I received this in about this period of
21 time at the close of each quarter.

22 Q Who prepared it?

1 A Bob McVetty prepared it in this case who
2 works in our finance department.

3 Q What does this document show?

4 A This document shows at that time that
5 our calculation showed that the record labels had
6 only paid us with respect to approximately 40
7 percent of the monies that would otherwise be due
8 us.

9 I might add to preempt a question, "How do we
10 know that?"

11 As I mentioned earlier we looked to industry
12 data to determine various things and Sound Scan
13 has a report that details DPD sales by title, and
14 that would be also single and albums, and we know
15 what the representation of our songwriters are on
16 those songs, the individual tracks and on the
17 albums.

18 We also know what the current situation is as
19 to whether or not disputes have been resolved or
20 not. Those are all factored in and we compare the
21 sales that were made directly to consumers against
22 those that we had been reported for for the

1 periods that we should have received an
2 accounting.

3 For example, if Apple were to report on a
4 monthly basis which I understand it does and that
5 fell into October, say, it was the end of October
6 they report, we will not be paid until the end of
7 that quarter or December.

8 We were actually paid in arrears on this. So
9 would not expect to receive our monies. It
10 depends by company when we would actually expect
11 it, but it is between 30 and 45 days following the
12 end of the quarter.

13 So we would not include anything in this
14 report which wouldn't have fallen into that
15 legitimate accounting period and so that's where
16 we get.

17 JUDGE ROBERTS: Mr. Faxon, what are you doing
18 at EMI to collect these monies that are in
19 arrears?

20 THE WITNESS: Oh, we are Dunning the hell out
21 of them. We send detailed analysis by title to
22 each and you can see some of what goes on, that is

1 detailed by song against with extracts from Sound
2 Scan detailing exactly our claim and trying to
3 resolve it.

4 We have in fact improved this number.

5 We are now up to over 50 percent, yes, it
6 hovers now between 55 and 60 percent being paid on
7 what we would otherwise have, but not all
8 publishers have the sort of resources that EMI
9 Music Publishing has and the tenacity to try to
10 drive this to a better conclusion.

11 So it's a serious problem for us and we take
12 it seriously.

13 JUDGE ROBERTS: Is there a particular reason
14 why you're offering testimony on this to us?

15 THE WITNESS: Yes, I believe, and there was
16 some reference to this in the proceedings
17 yesterday.

18 The NMPA has offered in connection with the
19 terms not only the rate, but I understand you not
20 only set the rate, but you also set the terms that
21 there be a late payment fee, if you will, charged
22 as part of the terms under which the licenses would

1 be granted so as to induce intermediaries such as
2 the record companies to more effectively and
3 promptly render statements and make payments.

4 JUDGE ROBERTS: You couldn't have put that
5 type of late payment provision in the contract
6 that you have with these record companies?

7 THE WITNESS: The answer is we could in some
8 respects, but these licenses are done through the
9 Harry Fox Agency, and essentially, are a template
10 against it. They are done through the Harry Fox
11 Agency as a single industry approach to try to
12 assure that the licenses do get issued.

13 I cannot speak for how the Harry Fox Agency
14 could operate, but as for me I think if there was a
15 statutory requirement that they would have to pay,
16 that would have a much more powerful impact on
17 curing this problem.

18 JUDGE ROBERTS: Do you have a late fee in any
19 of the NMDA agreements that you have?

20 THE WITNESS: I don't recall if there is.

21 JUDGE ROBERTS: Thank you.

22 MR. BLOCH: I have no more questions.

1 CROSS-EXAMINATION

2 BY MR. SMITH:

3 Q Good afternoon, Mr. Faxon.

4 A Good afternoon.

5 Q I thought I would start by asking you a
6 few questions about the functions and the roles
7 played by music publishers in the modern era. One
8 you said was discovering new songwriters, is that
9 right.

10 A Yes.

11 Q It is true, is it not, that most
12 songwriters that you sign --

13 CHIEF JUDGE SLEDGE: Sir, what is the modern
14 era.

15 MR. SMITH: Good question. Why not focus on
16 since 1999.

17 THE WITNESS: Thank you.

18 BY MR. SMITH:

19 Q It is true, is it not, using that time
20 frame that most of the songwriters you signed are
21 singer songwriters?

22 A I would say, yes, I believe that a

1 majority of the songwriters we sign have, also do,
2 also before perform, but that doesn't mean that
3 that is what they exclusively do. I would put
4 that in the majority. Not exclusively.

5 Q Is it fair to say that 75 percent or so
6 of the songwriters you sign are singer
7 songwriters?

8 A That perform in some capacity, yes.

9 Q In fact, very often when you sign
10 songwriters in this post-1999 era, they already
11 have record contracts, is that correct?

12 A Well, a record contract with a major
13 record company you mean?

14 Q I wasn't limiting it to that. With a
15 record company.

16 A Many of them have record agreements with
17 record companies that they themselves own. It is
18 a very large or they are participants in, but it
19 is a very large independent business. It may not
20 be large in terms of revenue, but it certainly is
21 large in terms of number.

22 Q Many of them also have contracts already

1 with larger record companies that they do not own.

2 A A number of them do, yes.

3 Q In fact, you prefer it that way. You
4 prefer to sign songwriters to your roster who
5 already have contracts with significant large
6 major record companies, correct?

7 A I think that might have been true
8 earlier in the "non-modern era" but I think
9 increasingly we are finding that the nature of the
10 way in which major record companies are operating
11 in the marketplace doesn't always suit the
12 development of the writers that we want to sign.

13 I don't think one can make a blanket
14 statement about it. It is about an individual
15 songwriter by songwriter analysis.

16 Q Is it accurate that you pay them more
17 generally when they have a record contract?

18 A Yes, absolutely that is true and that is
19 very simply so because an exploitation of the
20 timing between an exploitation of the song and its
21 writing is an important element in understanding
22 the economics of the transaction, yes.

1 Q To put it differently they are much
2 closer to actually commercializing their songs if
3 they already have a record contract.

4 A They tend to be so.

5 Q There is much less risk to you as a
6 publisher if you sign somebody who has already a
7 record contract?

8 A If you sat there with my accountants in
9 going through the advance provision which is what
10 we talked about earlier, I'm not sure they might
11 agree with you on that subject, but we run our
12 business on the basis that if we have a ready
13 route to exploiting the song, then that is a less
14 risky place to be, yes.

15 Q That is why you pay them more and you
16 are more likely to give them advances if they have
17 record contracts.

18 A We always do that. It is just the
19 amount that is at issue.

20 Q There was some discussion of this split
21 in the contracts that you sign, the amount that
22 the publishing company gets and the amount that

1 the songwriter gets.

2 A Yes.

3 Q You said typically now it is 75 percent
4 of the mechanical revenues that go to the
5 songwriter and 25 percent go the publisher.

6 A That is correct.

7 Q Is it also true that the market is
8 moving to the point where sometimes it is more
9 like 90 percent goes to the songwriter?

10 A Well, obviously, and as I said earlier
11 and you have just alluded to it, it's a matter of
12 the risk in the transaction.

13 If you have a more certain outcome against
14 the advances that you're making then your share of
15 revenues to account for that risk can be less and
16 so, yes, we do.

17 Q Did you sign 90/10 deals?

18 A We do.

19 Q Frequently?

20 A Frequently? Well, give me a percentage.

21 Q Maybe you can do that. Give me a
22 percentage estimate if you can.

1 A It is only the most successful
2 songwriters in our roster are at that level.

3 Q Those are the ones that are making most
4 of the money for you?

5 A They are, but that wasn't always true
6 and as they mature and it is also true in the
7 record industry, as you well know, that over time
8 as somebody becomes more successful and the risk
9 in them changes, the share changes as well.

10 So certainly an unknown artist songwriter
11 that we signed could be at the low end, but by the
12 time they are really successful they could indeed
13 get to the top end.

14 Q It is true, isn't it, that the typical
15 split sometime earlier than 1999, was around
16 50/50. That was the tradition many years.

17 A You would have to go back well before
18 1999, for the 50/50 deals to be the rule, but yes,
19 it was.

20 Q The reason the marketplace as to this
21 set of agreements has moved from 50/50 to 75/25
22 and is perhaps continuing to move towards 90/10,

1 is that publishers are doing less than they used
2 to do to promote songs to recording companies,
3 correct?

4 A You're taxing my knowledge of the music
5 business before I joined it 14 years ago. I am
6 not sure I can make a comparison. I have an
7 opinion, but I am not sure I am supposed have one
8 of them.

9 It is okay I can certainly give you my
10 opinion, but I don't have direct experience in
11 that respect.

12 Q I gave you what is marked, Mr. Faxon, as
13 RIAA Exhibit Trial Exhibit 2 which is your
14 deposition.

15 A I don't know. I haven't looked at it.

16 Q Do take a look at it, please.

17 A Without boring the entire hearing to go
18 through every bit of it, I assume it is. I am not
19 sure I can validate it because unlike some of
20 these things where I have actually gone through
21 all of these, I went through those in detail.

22 I actually haven't seen it in this form with

1 four pages on a page. Which is "green" of you.

2 Q It is cheaper that way too. Let me
3 asking you to turn over to page 28 of the
4 document.

5 A 28 of the pages or 28 --

6 Q 28 of the original typed pages. It is
7 upper right hand quadrant of the page. This is
8 during a portion of the deposition where you are
9 discussing this question of the transition from
10 50/50 up to higher ratios starting on line 10/5,
11 10/6.

12 A Just to clarify? The things that look
13 like time codes, those are pages or those are line
14 numbers?

15 Q It is the far right column that are the
16 line numbers and mine says 6. It says:

17 "And as songwriters became more
18 active in the exploitation of
19 their own music either by being
20 a singer songwriter and
21 therefore they themselves were
22 propagating their music into the

1 marketplace, as opposed to it
2 being sold into or persuade
3 another performer to do their
4 work, to perform their work,
5 they rightfully felt that they
6 were or they should share that
7 they shouldn't give the entirety
8 of 50 percent to the publisher
9 because they were not performing
10 the full amount of -- they were
11 not the full effort of
12 exploitation wasn't only in
13 their hands, they were sharing
14 it, and that, over time is what
15 happened and got us to pretty
16 much the 75/25."

17 Do you recall giving that testimony?

18 A I most certainly do and I consider that
19 my opinion, but since this is a factual thing. If
20 you believe that is factual, then I am happy to
21 call it a fact as I believe it to be true, but I
22 don't have personal experience in that period of

1 time. I am just an observer.

2 Q You have no reason to doubt the truth of
3 that statement.

4 A I made it and I believed that opinion,
5 yes.

6 Q Speaking of singer songwriters let me
7 ask you a little bit about Alecia Keys that we
8 discussed in paragraph 25, starting at around
9 paragraph 25 of the written direct testimony.

10 A Yes, just a moment.

11 Q That is on page 12.

12 A Yes.

13 Q You say in paragraph 25:

14 "Jody Gerson from EMI Music
15 Publishing 'first learned about
16 Alecia from an acquaintance in
17 the music business when Alecia
18 was only 14 years old."

19 I think you said today that Ms. Gerson found
20 her or discovered her. Is that right?

21 A I tried at the time, and I'm not sure
22 that I was all that successful, but I said it a

1 couple of ways in the testimony earlier that
2 identified, found, discovered, all these words is
3 ultimately or what she did was she brought her
4 under her wing, she got her an agreement, she put
5 her together with other songwriters to help her to
6 develop her craft and through EMI Music Publishing
7 provided her with financial support.

8 Q You say, and going back to your written
9 direct testimony:

10 "It took six years before Alecia
11 achieved any commercial
12 success."

13 A Yes.

14 Q The very next sentence, you say:

15 "During this period Alecia
16 signed with Columbia Records and
17 recorded an album."

18 It is true, is it not, that in fact she had
19 signed with Columbia Records before Jody Gerson
20 ever met her, isn't that right?

21 A She was dropped in that period of time,
22 so I'm not sure where you are going with that. I

1 don't believe that she was signed in that sense,
2 but if you have a contract it will be interesting
3 to see.

4 Q I am showing you what has been marked as
5 RIAA Trial Exhibit 3. This is an article from the
6 New York Times, and is a very complimentary
7 article about Jody Gerson and what a good job she
8 did with Alecia Keys.

9 If you will refer to the third paragraph of
10 the article, it says:

11 "The 21 year old Ms. Keys first
12 met Ms. Gerson after an
13 executive from Columbia Records
14 which had Ms. Keys under
15 contract introduced the two in
16 1996."

17 Does that refresh your recollection as to
18 whether Ms. Keys --

19 A It does not.

20 Q Was under contract at the time she was
21 introduced to -- Let me finish the question. At
22 the time she was introduced to Ms. Gerson?

1 A No.

2 Q Does it refresh your recollection that
3 the person that you referred to as acquaintance of
4 Ms. Gerson was in fact an executive of the
5 Columbia Record Company?

6 A I believe he was an executive of the
7 Columbia Record Company.

8 Q Do you know who that person was?

9 A I do not.

10 Q Is there some reason why you referred to
11 that person as an acquaintance of Ms. Gerson
12 rather than an executive of Columbia Record
13 Company in your testimony?

14 A Because it is an accurate statement
15 unless you believe it is an inaccurate statement
16 if that is the implication of your question.

17 Q The bottom line is, this is a case where
18 it was the record company that introduced Ms. Keys
19 to Ms. Gerson, correct?

20 A Well, that's an assertion that you are
21 making, but six years later she had a record, so
22 if the record company was all that interested in

1 her career somehow I think they would have done it
2 a little quicker.

3 MR. SMITH: If the Court could instruct the
4 witness to answer the question that is asked.

5 CHIEF JUDGE SLEDGE: No. He answered your
6 question. Your questions are mischaracterizing
7 his testimony and I would like you to phrase your
8 questions more accurately with what he has
9 testified to.

10 MR. SMITH: I will do my best.

11 BY MR. SMITH:

12 Q Did you not say that in fact the person
13 that introduced Ms. Keys to Ms. Gerson was an
14 executive from the Columbia Record Company?

15 A I didn't say that because I don't know
16 that for a fact. I know that it was an
17 acquaintance of Ms. Gerson and I had heard that it
18 was, but I don't know it as a fact. I do know it
19 was an acquaintance because she has told me it was
20 an acquaintance.

21 Q So Ms. Gerson told you it was an
22 acquaintance, but she didn't tell you it was a

1 record executive. It was somebody else who told
2 you that.

3 A Yes, that is correct.

4 Q You talked about the advance that was
5 paid to Alecia Keys by EMI Music Publishing.

6 A Yes.

7 Q Is it not also true that she was paid an
8 advance during the same time period by Columbia
9 Records?

10 A I don't know that.

11 Q You have no knowledge one way or the
12 other?

13 A Not one way or the other.

14 Q I will ask you about the next person
15 that you talked about, and that James Blunt?

16 A Yes.

17 Q You talked about him over on page 14.

18 A Yes.

19 Q Here you again talk about the advance
20 that was paid to him of \$300,000 over a period of
21 several years, is that right?

22 A Yes.

1 Q Do you have any knowledge in this case
2 about the magnitude of the advances if any that
3 were paid to him by the record company after he
4 was signed by the record company?

5 A I don't know what Custard Records paid
6 him.

7 Q Do you know if they paid him in advance?

8 A I assume they did, but I don't know that
9 for a fact.

10 Q You said in your testimony today orally
11 that you did not mean to be here telling us that
12 Mr. Blunt had this success with his debut album
13 solely as a result of the assistance that was
14 given to by EMI Music Publishing. You mentioned
15 Warner Records had something to do with that as
16 well?

17 A Yes.

18 Q Tell us what you know about the
19 assistance that was provided to him by Warner
20 Music, his record company?

21 A I think he had quite extensive help from
22 the record company. I thought they did a

1 brilliant job of trying to find a marketplace for
2 someone who didn't quite fit the mold. So I had
3 nothing but compliments for what they did.

4 Q Is it true that they mounted a massive
5 marketing campaign for his debut album when first
6 coming out?

7 A You will recall that the initial release
8 of his album was in the UK, and the key ingredient
9 there was to get it played on Radio One which is
10 in that world a place where new artists need to
11 debut and that was accomplished by Deca Morrow on
12 our staff to make that happen.

13 So that led off a level of success in the UK
14 and Warner Music in the UK built on that very
15 successfully and then James came in back here
16 where Custard is based and I think through a lot
17 of rather great cooperation between all of the
18 people who were associated with James, the
19 publisher, the report company, management,
20 everybody threw themselves into trying to make him
21 as successful as he became.

22 Again, I am very complimentary of the way

1 that Warner Music dealt with and treated James.

2 I will say as I said earlier about Alecia, I
3 think I used the word "kismet" for Jay Records and
4 Clyde Davis and Alecia to be brought together and
5 that has been a very very successful relationship.
6 Very good.

7 Q One of things that you liked about the
8 way Warner Music had handled the James Blunt
9 situation is that they had spent something like \$4
10 million to \$5 million on a marketing campaign on
11 his first album, is that not right?

12 A No, I actually was complimentary of them
13 because they utilized an awful lot of promotional
14 things that created a broader awareness. I am
15 unaware of how much they spent on the marketing.
16 It's not a fact that I am aware of.

17 Q Let's turn to a different topic. You
18 talked in your testimony starting in paragraph 48
19 about the enhanced value of music sold to
20 customers through digital delivery.

21 A Yes.

22 Q You are talking primarily there about

1 permanent downloads.

2 A I am talking about all of the on-line
3 and digital uses. There is portability. There is
4 the ability to manage the files, all of those
5 things and others make it a better product, and
6 therefore, a product that is more valuable to
7 consumers.

8 Q In saying that it is a more valuable
9 product, and I think you indicated it this
10 morning, you are not making reference to what
11 consumers are actually paying for that product,
12 right?

13 A No, I am not directly saying that. That
14 is correct. I agree with the statement you said.
15 There are too many negatives in there.

16 Q It is true that consumers actually don't
17 pay more for downloads by and large than they pay
18 for CDs, correct?

19 A That is true and it's interesting having
20 been involved on the record side of the business
21 and there has been quite a lot of discussion in
22 the background on the desire of the record

1 industry to change the pricing in iTunes to allow
2 so-called variable pricing, prices to be higher in
3 some cases and potentially lower in other cases
4 and having been present to hear Dour Morrison and
5 others rail against the artificially low prices.

6 MR. CONNOLLY: Objection. This is beyond the
7 scope. It is argumentative. This is not
8 responsive to the question asked.

9 CHIEF JUDGE SLEDGE: Overruled.

10 THE WITNESS: I think I'm just putting myself
11 in good company in viewing that one should look at
12 the values transferred.

13 BY MR. SMITH:

14 Q In fact, the price of an album, a CD, or
15 the album when downloaded is \$9.99 on iTunes?

16 A Yes.

17 Q What would you say to your knowledge is
18 the average price right now for a CD?

19 A At the moment, I don't know what the
20 average price is of a CD, but if I go into
21 Wal-Mart I can pretty much pick it up for \$9.99.

22 Q Give us your best estimate of what that

1 average price is in the marketplace as a whole.

2 A I cannot give you at this moment, but I
3 can speculate on it.

4 Q I am asking you to make an estimate.
5 Are you able to do that?

6 A I hope this is obvious. I am a pretty
7 precise guy, and therefore, if I am to make an
8 estimate I want to be able to look at data and
9 understand it and as opposed off the cuff make an
10 estimate that I will later regret.

11 Q You agree would you not that at a
12 minimum it is considerably higher than \$9.99 the
13 average price of a CD.

14 A I will go through my reasoning for not
15 being certain that that is the case. When there
16 was a large number of retail establishments that
17 were dedicated to music retail the prices were
18 relatively high or higher than they are today.

19 As that part of the retail market has
20 declined and discounters and large box retailers
21 have taken over retail prices is much more
22 competitive, and therefore, I would assume, or I

1 observed that retail prices have come down.

2 I don't know quite how much, and to where,
3 but I certainly I would be uncomfortable in
4 suggesting that it is significantly above the
5 \$9.99.

6 Q One of the reasons that you say that
7 downloaded music has a higher intrinsic value is
8 that it tends to be bought as a single?

9 A I would say or I think my point, and at
10 least I hope I said it in this way is that what
11 happens in the single is more of the value that
12 was spread across the album now resides in the
13 single.

14 Q You say in the first sentence of
15 paragraph 49:

16 "The value of music to consumer
17 also has increased because
18 consumers have a greater ability
19 now to purchase only the songs
20 they want instead of having to
21 purchase a CD album that may
22 have a few songs they want and

1 other song in which they are
2 less interested in."

3 A I said it better there. I probably
4 should have referred to that.

5 Q Yes, do feel free to refer to that at
6 any time if you want. That theory depends on the
7 proposition that as you say in the next page:

8 "The download market is
9 principally a single's world."

10 A Yes.

11 Q One of the things you did in this
12 testimony is you took some data about the download
13 market and you had somebody do some number
14 crunching to come up with this estimate that
15 appears towards the top of page 26, of 70 percent
16 of the singles that are downloaded are singles?

17 CHIEF JUDGE SLEDGE: You may want to rephrase
18 that question because I don't think you said what
19 you meant to say.

20 MR. SMITH: I appreciate that, your Honor.

21 BY MR. SMITH:

22 Q Let me ask you to refer to that estimate

1 of 70 percent of the songs that are downloaded
2 that are singles and that appears at line 8 on
3 page 26.

4 A Yes, I see it.

5 Q That number was calculated by you or by
6 somebody at EMI Music Publishing taking some data
7 about singles and album sales on iTunes and then
8 doing some number crunching, correct?

9 A I think it refers to the IPI Report.

10 Q What I just gave you is what is in fact
11 Exhibit 13 to your statement as it was first
12 provided to us. You see there is a reference to
13 Exhibit 13 there.

14 A Yes.

15 Q This is a document generated at EMI,
16 correct?

17 A Yes, it is sourced out of the IPI
18 digital musical reports of 2006 and formatted by
19 EMI Music Publishing Finance.

20 Q One of the things that people at EMI did
21 they is that added in the estimate that the number
22 of tracks per album is ten, correct?

1 A Yes.

2 Q That is not true, is it, on average the
3 number of tracks on an album in this current day
4 and age is 10?

5 A Sound Scan reports album equivalence
6 based upon that measure.

7 Q The question I have is whether in fact
8 the number of tracks per album is higher than
9 that, and is it not in fact 13?

10 A I am not sure how much the numbers of
11 tracks per digitally downloaded albums there are,
12 so the answer is I am uncertain as to that.

13 What was chosen here is an industry standard
14 that in most reports you will see as the basic
15 conversion.

16 Q I will ask you to turn back to page 25
17 in paragraph 49, the third sentence of that
18 paragraph you assert there that CDs have 12 to 14
19 songs per album, correct?

20 A Yes.

21 Q That is in fact the reality, isn't it,
22 that the average is around 13?

1 A I think 12 to 14 songs in a physical
2 world is indeed likely a good range. The question
3 I thought you were posing to me is how many tracks
4 are there on digital albums and that I adopted in
5 this statement to use the industry standard
6 because I haven't observed those and the reason
7 there might be differences and there are likely to
8 be --

9 Q Just answer the question.

10 A I just said that.

11 Q What is the reason then why there might
12 be differences?

13 A The reason it might be different is that
14 in the physical world there are more compilations
15 that are sold as individual units and they tend to
16 have more tracks than in the digital world where
17 compilations are not as prevalent.

18 Q If you had used 13 instead of ten in
19 this calculation on RIAA Trial Exhibit 4, the
20 percentage of tracks downloaded as singles would
21 have gone down significantly, correct?

22 A Yes.

1 Q You also testified in your written
2 statement that the price of downloads is
3 artificially low, do you recall that?

4 A Yes.

5 Q You say in paragraph 50 on the bottom of
6 page 26:

7 "Apple's CEO, Steve Jobs, has
8 said that Apple does not make
9 any money on the sale of music
10 through the iTunes Music Store
11 but rather on the sale of
12 iPods,"

13 and you base that factual assertion on a Time
14 Magazine article of November 17, 2003, and
15 that used to be Exhibit 14 to your testimony.

16 Do you see that?

17 A Yes, I do see that.

18 Q I am showing you what is marked as RIAA
19 Trial Exhibit 5.

20 MR. BLOCH: If we could have a copy, Mr.
21 Smith.

22 BY MR. SMITH:

1 Q Is this, in fact, Mr. Faxon, the Time
2 Magazine article you cited and supplied to us as
3 Exhibit 13 to your statement.

4 A Certainly looks so, yes.

5 Q Turn to second page of Exhibit 5, it
6 says there in the fourth full paragraph:

7 "That at most Apple makes a 10
8 percent product."

9 A Correct?

10 A Yes.

11 Q There is in fact nothing in this exhibit
12 that supports that statement in your written
13 testimony that, yes, Mr. Jobs said that they do
14 not make money off the sale of iTunes, is that
15 right?

16 A It says:

17 "That at most jobs is left with
18 a dime per track. Why even
19 bother? Because we are selling
20 iPods."

21 Says Jobs, and I took the inference from that
22 that profit on the sale of music was not his

1 principle objective.

2 Q But you would not want to take from this
3 article any inference that he doesn't make a
4 profit from the sale of selling iTunes, correct?

5 A I think his assertions, not only here
6 but elsewhere, it is my recollection that he had
7 said these words so I stand by my statement.

8 Q Do you know if in fact they make more
9 than 10 percent or is it less than a 10 percent
10 and -- Excuse me, but I do have to finish the
11 question for this record, on the sale of music on
12 iTunes?

13 A I don't know what they make as Mr. Jobs
14 hasn't shared that with me, but I have seen how
15 much money they make as an overall corporation and
16 it quite impressive and it has been
17 extraordinarily impressive since the introduction
18 of the iPod.

19 Q Let me ask you about the portion of your
20 written testimony back on page 21 under the
21 heading, "The need for higher rates insent."

22 A Yes.

1 Q Is that word there by the way?

2 A I'm not sure.

3 JUDGE WISNIEWSKI: Actually it is a word that
4 is superior to mono tones.

5 MR. SMITH: In somewhat the same category,
6 your Honor.

7 BY MR. SMITH:

8 Q It is true that the current mechanical
9 rate is the highest it has ever been, right?

10 A In nominal terms, yes.

11 Q In fact, it has gone up 20 percent in
12 just the last seven or eight years?

13 A It has gone up many more times than in
14 the last 100.

15 Q So my question is a yes or no.

16 A Yes.

17 Q During that past seven or eight years,
18 CD prices have been falling sharply. I believe
19 you said that?

20 A When did I say that?

21 Q I thought you said it in your direct.

22 If not, I will withdraw that part of the question

1 over. Is it true during the period of time from
2 2001 to the present that CD prices have been
3 falling in this country?

4 A By that you mean retail CD prices?

5 Q You can start with that.

6 A Yes.

7 Q How about wholesale prices?

8 A That's a harder answer to give because
9 it depends on the mix of product that is being
10 offered. I would infer from what I have seen that
11 it has, but I don't believe at the same decline as
12 retail prices.

13 Q The main problem that you see with
14 respect to incentives for creativity has to do
15 with reduction in royalties caused by the decline
16 in volume and the decline in price, correct? I
17 take it decline in volume, correct?

18 A The decline in volume, yes.

19 Q Essentially what you're saying is that
20 because there are less CDs being sold, or fewer
21 CDs being sold, and fewer downloads sold, or
22 actually fewer CDs being sold the record companies

1 have to pay a higher rate to the songwriters than
2 to the publishers, correct?

3 A They need to pay a higher rate to the
4 songwriters and if the songwriters choose to
5 employ a publisher whose fees are based upon a
6 portion of their revenues then the publisher will
7 benefit, yes.

8 Q Is that based on some supposition that
9 this downturn in the marketplace has been hurting
10 songwriters more than it has been hurting record
11 companies?

12 A I am afraid I have to give you an
13 involved answer. The question I ask myself is
14 this. Is these self inflicted pain? Essentially
15 a songwriter is dependent upon the choices made by
16 others as to what the ultimate sale value and
17 prospects of the material that they develop is.

18 So the question for me is that they are
19 subject to other's choices and their creativity
20 depends on their ability to deliver the product
21 that you want, the input you require because that
22 is the essential ingredient in your product.

1 You need to provide them with sufficient
2 incentive and sufficient income in order to
3 support their ability to continue to deliver that
4 output.

5 Would your profitability improve if you made
6 changes, yes, and your businesses are making
7 changes, but the songwriters sit there without a
8 control over what the price is, what your business
9 practices are, or any of those things.

10 They are compelled to give you their product
11 and they deserve and they need in order to
12 continue to do that a sufficient amount of income
13 to support them to create that creative output.

14 Q Is it your testimony that songwriters
15 have been more harmed by record companies by the
16 downturn in the market?

17 A I think that both record companies,
18 publishers and songwriters have been harmed and
19 making value judgment as who is more harmed is --
20 Well, the question for me is who can do more to
21 cure the problem?

22 Q Fair enough.

1 CHIEF JUDGE SLEDGE: If I can interrupt. How
2 is your answer on songwriters different than
3 everyone else in the world who is compensated?

4 Isn't everyone in the world who is compensated
5 subject to the factors they do not control?

6 THE WITNESS: Yes, but not everybody in the
7 world is compelled by law to provide their works.

8 I as an executive am subject to all sorts of
9 effects, but I can choose to work for someone else.
10 I am not compelled to work for EMI.

11 My songwriters are compelled to make their
12 outputs available at a price set in proceedings
13 such as this so they have less control than almost
14 anybody in our society over their output.

15 I would agree to the general proposition, but
16 not to the specific application here.

17 CHIEF JUDGE SLEDGE: I guess the people that
18 work for the food service industry would feel
19 there is very little control over their lives too.

20 THE WITNESS: I don't want to suggest that
21 there are not social issues that do create traps
22 and it may be that very same feeling of not being

1 able to control that one has to adjust in society
2 generally.

3 CHIEF JUDGE SLEDGE: I don't see any
4 uniqueness in your answer.

5 THE WITNESS: The uniqueness is that the food
6 services worker is guaranteed a minimum wage, and
7 in the statutory world the songwriter is
8 guaranteed a maximum wage.

9 He cannot get more than what you set.

10 Whereas somebody who is working in any job
11 there is a minimum amount that the government has
12 determined is appropriate to require employers to
13 pay and depending on their talent they have the
14 ability to bargain for more.

15 Here depending on your talent you don't have
16 the ability to bargain for more. It is what it is.
17 I think it is different.

18 BY MR. SMITH:

19 Q Let me follow up on that. It is true,
20 is it not, for the songwriter when they write a
21 song that has not been recorded yet and they are
22 going out into the marketplace to sell that song

1 to a performer they are not compelled to sell it,
2 are they?

3 A Not at that point. There is the first
4 use doctrine. Where somebody can withhold their
5 composition until they want to allow it to be
6 used.

7 Q All agreements for first uses of songs
8 are entirely voluntarily agreements negotiated by
9 the publishers or songwriters with the performer
10 and record company?

11 A Yes, and I think the ultimate issue is
12 the negotiation for that person is to get their
13 song into marketplace and to negotiate to get it
14 in there, and therefore, they tend, most people
15 who want to be commercial, will negotiate down to
16 get it accepted into the market.

17 Q Do songwriters typically receive any
18 more than the statutory rate in those voluntary
19 first use deals?

20 A No, and they quite often receive less.

21 Q Is it your testimony that because of the
22 lack of intensive that you're talking about here

1 there has been some reduction in the number of
2 songwriters?

3 A No, I don't think there has been. I
4 think there numerous or thousands and thousands of
5 songwriters, but I do believe that there has been
6 a reduction in the number of, and again pardon my
7 phrase, your Honor, the professional songwriters,
8 those people who make it their living make it
9 their career to write songs and that is the source
10 of virtually all of the underlying product that
11 drives your clients' industry.

12 Q But your testimony and this is paragraph
13 42, is that there are still hundreds of thousands
14 of people who are writing songs and trying to sell
15 them, correct?

16 A Yes, and my daughter is one of those,
17 but I am not sure I would call her a professional
18 songwriter, so I wouldn't wanted to be quoted on
19 that.

20 Q Oh, it's too late! Right now you said
21 EMI Music Publishing owns the rights to 1.3
22 million songs?

1 A Yes.

2 Q You are about, what, 20 percent of the
3 industry?

4 A Yes, it's hard to measure our industry
5 but yes that is about the claim we would make.

6 Q It is fair to say that if we look at at
7 least all the major publishing companies and added
8 up all the songs together it would be many many
9 millions of songs that they own rights to?

10 A Yes.

11 Q You say in your testimony that all of
12 those songs are only a very small percentage of
13 the songs that are written every year?

14 A Absolutely.

15 Q The vast majority of songs are never
16 acquired by any publisher.

17 A That is correct.

18 Q You say in your testimony on page 23:

19 "That the consequence of the
20 current mechanical rate is that
21 there are many creative works
22 including great works that never

1 are composed."

2 A Yes, I see that.

3 Q What evidence do you have for that
4 claim?

5 A I hope I have tried to effectively
6 establish that great works most often come from
7 professional songwriters who make it their living
8 and if the available income goes down then the
9 numbers of people that would dedicate their lives
10 to writing songs will decline, and if that's the
11 case, then creative output will decline of the
12 quality that your clients wish to include in their
13 productions, that declines, and that is not a good
14 thing and that is what we are trying to say here.

15 MR. SMITH: Your Honor, I was about to turn
16 to another topic, so this might be a good time to
17 recess, or it would perhaps be in the Court's best
18 interests to stop at this time, but it is a good
19 time for me to do that.

20 But let me ask if the Court could be clear on
21 the rules about in terms of specking with the
22 witnesses when they are in the middle of their

1 cross-examination over the break.

2 CHIEF JUDGE SLEDGE: I'm not sure that that
3 has been established. I believe that in the last
4 two proceedings the parties announced their
5 agreement that witnesses that the witness's
6 testimony not be discussed by the attorney
7 presenting the witness.

8 I don't believe there has been any ruling by
9 the bench on that issue, so as far as I know there
10 is no ruling except as to what is agreed to between
11 the parties.

12 MR. SMITH: I wanted to be sure that it was
13 clear one way or the other so we wouldn't have a
14 fight over it.

15 CHIEF JUDGE SLEDGE: It is one of those
16 things where we haven't been pushed to make a
17 ruling on it and therefore we have not ... but I
18 do recall there was one incident.

19 JUDGE ROBERTS: That was you, Mr. Smith.

20 MR. SMITH: Yes, it was!

21 CHIEF JUDGE SLEDGE: That was raised about 5
22 comments where the other side confessed that they

1 shouldn't have been doing that or they denied
2 doing that or something like that.

3 I am pretty vague on that, but I recall an
4 incident arising, but I don't recall a ruling by
5 the bench. Do you recall anything?

6 MR. SMITH: That is pretty much what
7 happened. Thank you very much.

8 CHIEF JUDGE SLEDGE: We are in recess until
9 9:30.

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11 (Whereupon, the hearing
12 concluded at 4:35 p.m.)

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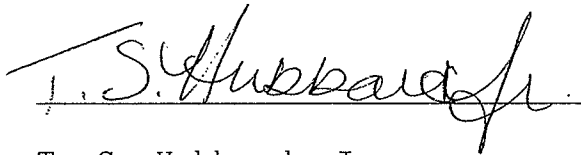
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REPORTER'S CERTIFICATE

I hereby certify the foregoing to be a true and accurate transcription taken by my hand and transcribed by me and/or under my supervision.



T. S. Hubbard, Jr.

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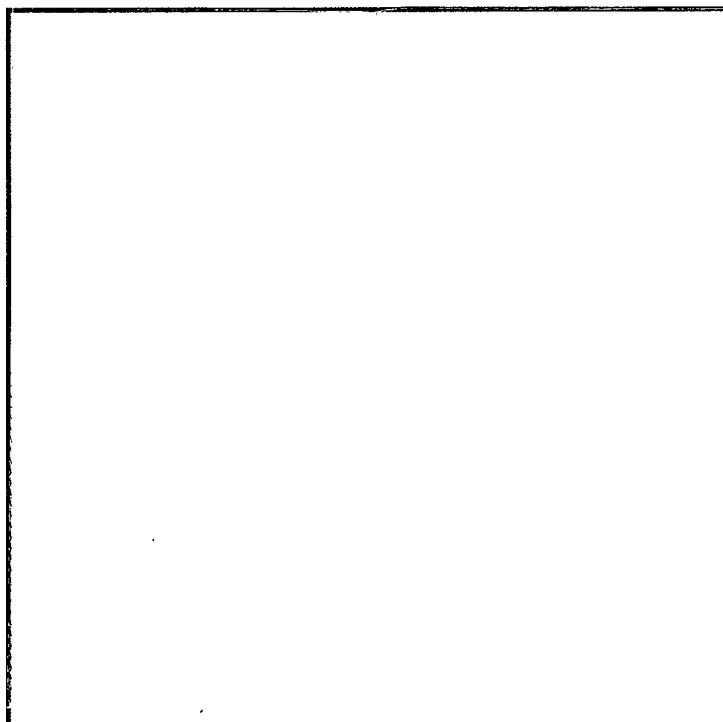
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